(13)

No. 01-631-CFY Title: United States, Petitioner
v.
Christopher Drayton and Clifton Brown, Jr.

Docketed: October 15, 2001 Court: United States Court of Appeals for the Eleventh Circuit

Entry	Date	Proceedings and Orders
	Jul 31 2001	Application (01A97) to extend the time to file a petition for a writ of certiorari from August 14, 2001 to September 13, 2001, submitted to Justice Kennedy.
	Aug 1 2001	Application (01A97) granted by Justice Kennedy extending the time to file until September 13, 2001.
	Aug 30 2001	Application (01A97) to extend further the time to file a petition for a writ of certiorari from September 13, 2001 to October 13, 2001, submitted to Justice Kennedy.
	Aug 31 2001	Application (01A97) granted by Justice Kennedy extending the time to file until October 12, 2001.
	Oct 12 2001	Petition for writ of certiorari filed. (Response due November 14, 2001)
	Nov 14 2001	Brief of respondents Christopher Drayton and Clifton Brown in opposition filed.
	Nov 14 2001	Motion of respondents for leave to proceed in forma pauperis filed.
	Nov 28 2001	DISTRIBUTED for Conference of January 4, 2002
	Nov 28 2001	Supplemental brief of respondents filed.
	Nov 28 2001	Reply brief of petitioner United States filed.
	Jan 4 2002	Motion of respondents for leave to proceed in forma pauperis GRANTED.
	Jan 4 2002	Petition GRANTED. SET FOR ARGUMENT April 16, 2002. **********
	Jan 9 2002	Motion of respondent Clifton Brown, Jr., for appointment of counsel filed.
	Feb 8 2002	Motion of counsel Spivey to strike and objection to attempted substitution of counsel filed.
	Feb 8 2002	Motion of counsel Seliger to strike and objection to attempted substitution of counsel filed.
	Feb 13 2002	Response by counsel Koch to motions to strike filed.
	Feb 13 2002	Brief amici curiae of Americans for Effect Law Enforcement, et al. filed.
	Feb 14 2002	Reply thereto by counsel Spivey filed.
	Feb 18 2002	Reply thereto by counsel Seliger filed.
	Feb 19 2002	Joint appendix filed.
	Feb 19 2002	(Joint appendix to be printed)
	Feb 19 2002	Supplement to motion by counsel Spivey filed.
	Feb 19 2002	Brief of petitioner United States filed.
	Feb 19 2002	Brief amici curiae of Washington Legal Foundation, et al. filed.
	Feb 20 2002	Motion of respondent Christopher Drayton for appointment of counsel filed.
	Feb 25 2002	Motions DISTRIBUTED.
	Mar 4 2002	Motion for appointment of counsel GRANTED and it is ordered that Steven L. Seliger, Esquire, of Quincy,

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No. 01-631-CFY

Entry	Date	Proceedings and Orders
		Florida, is appointed to serve as counsel for the respondent Clifton Brown, Jr., in this case.
	Mar 4 2002	Motion of counsel Spivey to strike and objection to attempted substitution of counsel GRANTED.
	Mar 4 2002	Motion of counsel Seliger to strike and objection to attempted substitution of counsel GRANTED.
	Mar 4 2002	Motion for appointment of counsel GRANTED and it is ordered that Gwendolyn Spivey, Esq., of Tallahassee, Florida, is appointed to serve as counsel for the respondent Christopher Drayton in this case.
	Mar 11 2002	Record filed.
	Mar 11 2002	Record filed.
	Mar 20 2002	CIRCULATED.
	Mar 20 2002	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
	Mar 21 2002	Brief of respondents Christopher Drayton and Clifton Brown, Jr. filed.
	Mar 22 2002	LODGING consisting of twenty copies of photographic prints and attached CD received from counsel for respondentDrayton and distributed.
	Apr 9 2002	Reply brief of petitioner United States filed.
	Apr 16 2002	ARGUED.

Supreme Court, U.S.
FILED

01.631 OCT 2001

OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

CHRISTOPHER DRAYTON AND CLIFTON BROWN, JR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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-13 PP

QUESTION PRESENTED

Whether an officer who informs a passenger on a bus that the officer is conducting drug and illegal weapons interdiction and asks the passenger for consent to search, while another officer stays at the front of the bus without blocking the exit, has effected a "seizure" of that passenger within the meaning of the Fourth Amendment and *Florida* v. *Bostick*, 501 U.S. 429 (1991).

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In the Supreme Court of the United States

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CHRISTOPHER DRAYTON AND CLIFTON BROWN, JR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-9a) is reported at 231 F.3d 787. The oral decision of the district court (App., *infra*, 10a-14a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 24, 2000. A petition for rehearing was denied on May 16, 2001. App., *infra*, 15a-16a. By letters dated August 1 and 31, 2001, Justice Kennedy extended the

time within which to file the petition for a writ of certiorari to and including October 12, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the Constitution of the United States provides in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * * .

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Florida, respondent Christopher Drayton was convicted of conspiring to distribute cocaine, in violation of 21 U.S.C. 841(a)(1) and 846, and possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Following the entry of a conditional guilty plea in the same court, respondent Clayton Brown was convicted of the same offenses. Drayton was sentenced to 120 months of imprisonment to be followed by eight years of supervised release; Brown was sentenced to 88 months of imprisonment to be followed by five years of supervised release. The Court of Appeals for the Eleventh Circuit reversed and remanded with instructions that the district court grant respondents' motions to suppress. App., *infra*, 1a-9a.

1. On February 4, 1999, respondents were passengers on a Greyhound bus from Ft. Lauderdale, Florida, to Detroit, Michigan, when that bus made a scheduled stop at a Greyhound bus station in downtown Tallahassee, Florida. During the stop, all 25 to 30 passengers on board were required to get off the bus for reasons unrelated to law enforcement. After the passengers reboarded, three members of the Tallahassee Police Department asked the driver for permission to board the bus. The driver gave them permission, and left the bus to complete necessary paperwork in the terminal office. The police officers were dressed casually, and each had his badge around his neck or in his hand. The officers' weapons were carried in side-holsters that were covered by their clothing, and there is no evidence that any passenger ever saw that the officers were armed. App., *infra*, 2a-3a.

After boarding the bus, Officers Lang and Blackburn made their way to the back, "while Officer Hoover knelt in the bus driver's seat, facing toward the rear in order to observe the passengers and ensure the safety of the other officers." App., *infra*, 3a. Officers Lang and Blackburn began to move forward, asking passengers about their travel plans and trying to match passengers with the luggage in the overhead racks. To avoid blocking the aisle, the officers stood next to or behind the passengers with whom they were talking. *Ibid.*

Drayton was seated on the driver's side of the bus, a few rows forward of the rear, in the aisle seat, and Brown was seated next to him. Officer Lang approached them from the rear and leaned over Drayton's right shoulder. He showed them his badge and, with his face approximately 12-18 inches away from Drayton's, spoke to respondents in a voice just loud enough for respondents to hear. App., *infra*, 4a. See also 3/16/99 Tr. 19, 26. He stated: "I'm Investigator Lang with the Tallahassee Police Department. We're conducting bus interdiction, attempting to deter drugs and illegal weapons being transported on the bus. Do you have any bags on the bus?" Respondents answered by pointing to a green bag in the overhead rack. Officer

Lang then asked, "[d]o you mind if I check it?," to which Brown responded, "[g]o ahead." Lang handed the bag to Officer Blackburn, who checked it and found no contraband. App., *infra*, 4a.

During that interaction, Officer Lang noticed that respondents were wearing heavy jackets and baggy pants, even though it was a warm day. App., *infra*, 4a-5a. Smugglers, he was aware, often used baggy clothing "to conceal weapons or narcotics on their person." 3/16/99 Tr. 30. Lang therefore asked for and received permission from Brown to pat him down for weapons. During the patdown, Lang touched hard objects on Brown's thighs that resembled drug packages he had detected on other occasions. He arrested Brown and handcuffed him, and Officer Hoover escorted Brown off the bus. App., *infra*, 5a. Officer Lang next turned to Drayton and asked, "[m]ind if I check you?" Drayton responded by lifting his hands approximately eight inches off his legs. Officer Lang conducted a similar patdown and detected the same kind of hard objects on Drayton's thighs. Drayton was then arrested and escorted off the bus. A later search of respondents revealed that Drayton had 295 grams of cocaine powder taped to the multiple pairs of boxer shorts he was wearing, and that Brown had 483 grams of cocaine powder taped to his multiple pairs of boxer shorts as well. App., *infra*, 5a.

2. A federal grand jury returned a two-count indictment charging respondents with conspiring to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 846, and possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Gov't C.A. E.R. 12 (indictment). Respondents moved to suppress the cocaine. Relying on two Eleventh Circuit decisions that involved bus interdictions, *United States* v. *Guapi*, 144 F.3d 1393 (1998), and *United States* v. *Washington*, 151 F.3d 1354 (1998), respondents argued that their consent to Officer Lang's request to search their persons was not "voluntary" because they "were not told they did not have to consent" or that they were free to leave the bus. See, *e.g.*, Drayton C.A. E.R., Tab 22, at 2.

Following an evidentiary hearing and the arguments of counsel, the district court denied the motion. "[T]he police conduct," the district court concluded, "was not coercive and * * * the search was therefore voluntary." App., *infra*, 10a (3/16/99 Tr. 104). The two Eleventh Circuit cases relied upon by respondents, the court further held, were distinguishable. In those cases, the court explained, the officers made a general announcement from the front of the bus that might have suggested that the passengers were not free to leave the bus or that they were not permitted to refuse cooperation. Here, in contrast, "[t]here was no general announcement" when the officers got on the bus, "[t]here was nothing coercive," and nothing Officer Lang said or did "would suggest to a reasonable person that they were not free to leave." *Id.* at 14a (3/16/99 Tr. 107-108). Although the officers did not "tell [respondents] that they don't have to consent," the court noted, "there's nothing in the law that says they have to do that." *Id.* at 13a, 14a (3/16/99 Tr. 106).

3. The court of appeals reversed. App., *infra*, 1a-9a. "This case," the court stated, "is controlled by our decision in *United States* v. *Washington*, 151 F.3d 1354 (11th Cir. 1998), which extended *United States* v. *Guapi*, 144 F.3d 1393 (11th Cir. 1998)." App., *infra*, 5a-6a. In *Guapi*, two officers had boarded the bus at a scheduled stop, and one of them made a general announcement to all passengers that he wanted to check on-board lug-

gage for drugs and contraband. He and his partner then waited for passengers to open their bags, at which time one of them proceeded down the aisle of the bus, starting at the front, inspecting each bag. Holding that a Fourth Amendment seizure had occurred, the court of appeals explained that the officer's general announcement effectively meant that "the attention and cooperation of all passengers [was] required." 144 F.3d at 1396. The court reasoned that the coercive effect of such an announcement was qualitatively different from a one-on-one interaction. It is not unusual for one passenger to approach another, the court explained, and "there is no reason to believe that when police officers engage in similar behavior that they are coercing or intimidating citizens." *Ibid.* The court also thought it significant that the officer, "[i]nstead of beginning his search in the rear of the bus, which would have permitted those passengers who felt uncomfortable * * * to exit without confronting the police," had "stood in front of each passenger" and thereby "blocked the aisle." *Ibid.* While declining to impose a "per se rule requiring bus passengers to be informed of their constitutional rights," the court found that the announcement, the blocking of the aisle, and the failure to advise passengers that they had the right to refuse the request for consent, effectuated a seizure because a reasonable person would not have felt free to refuse to cooperate. *Ibid.*

In *Washington*, the court of appeals again concluded that a defendant's consent to the search of his luggage on a bus was invalid because of the general announcement at the front of the bus and the officers' failure to advise the passengers that they had the right to refuse to consent. 151 F.3d at 1356. The officer, the court explained, had "held his badge above his head and identified himself as a federal agent." *Id.* at 1357. "He

announced what he wanted the passengers to do, and what he was going to do." *Ibid.* Under those circumstances, and "[a]bsent some positive indication that [the passengers] were free not to cooperate," the court found it "doubtful a passenger would think he or she had the choice to ignore the police presence." *Ibid.* Judge Black dissented in *Washington*. The majority, she explained, had in effect established a "per se rule" that officers must explicitly advise bus passengers of their right to refuse to consent before consent will be deemed voluntary. *Id.* at 1357-1358. That result, she contended, "conflicts" with this Court's "consistent[] reject[ion] [of] per se rules in the Fourth Amendment context." *Ibid.* (citing *Florida* v. *Bostick*, 501 U.S. 429 (1991), and *Ohio* v. *Robinette*, 519 U.S. 33 (1996)).

In this case, the court of appeals concluded that, although Officers Lang, Blackburn, and Hoover had neither blocked the aisle nor communicated that cooperation was required through a general announcement, *Guapi* and *Washington* compelled the conclusion that respondents had been seized. Like the officers in *Guapi* and *Washington*, the court stated, Officer Lang in this case began the encounter with a "show of authority" by displaying his badge in his hand and stating that he was conducting an interdiction. App., *infra*, 6a. The fact that the officer spoke to each passenger individually in a quiet tone, the court stated, made no difference: "We do not believe that a passenger-specific show of authority is any less coercive than a general bus-wide one." App., *infra*, 7a.

The court also refused to distinguish this case from *Washington* and *Guapi* based on the fact that, in this case, the officer did not ask respondents for tickets or identification. App., *infra*, 7a. Whether or not an officer asks for such documents, the court stated, does

not affect whether other requests or commands are coercive. *Ibid.* Nor did it matter that passengers had in other instances declined to have their luggage searched or had exited the bus, the court stated. *Id.* at 8a. There was no evidence of what was said in those other cases, the court noted, and the number of times in which passengers had left the bus were few in comparison to the number of bus interdictions. *Ibid.* Finally, the court concluded that the presence of an officer in the bus driver's seat, at the front of the bus, contributed to the finding that the passengers had been seized. Seeing an officer stationed near the bus exit, the court stated, "might make a reasonable person feel less free to leave the bus." *Id.* at 9a.

The court of appeals acknowledged that *Washington* "has been criticized by the Tenth Circuit" for establishing a de facto requirement that officers warn bus passengers of their right to refuse cooperation. App., *infra*, 2a n.2 (discussing *United States* v. *Broomfield*, 201 F.3d 1270 (10th Cir.), cert. denied, 531 U.S. 830 (2000)). The court also acknowledged that the Tenth Circuit had, for that reason, "declined to follow" *Washington*. *Ibid.* Nevertheless, the court deemed itself bound by *Washington* as in-circuit precedent. *Ibid.* The court of appeals denied the government's petition for rehearing en banc. App., *infra*, 15a-16a.

REASONS FOR GRANTING THE PETITION

The court of appeals held that respondents, passengers on a Greyhound bus, were unlawfully seized and that their consent to search was invalid, when an officer spoke to them individually in a quiet voice, did not point weapons or make intimidating movements, left the aisle free for passage, and used no words that would suggest that respondents were required to cooperate or could

not leave the bus. The court of appeals concluded that a seizure had occurred because the officer, at the beginning of the conversation, identified himself as a police officer, and because another officer was kneeling in the bus driver's seat where he could be seen by the passengers. That result cannot be reconciled with this Court's cases, including *Florida* v. *Bostick*, 501 U.S. 429 (1991), and *INS* v. *Delgado*, 466 U.S. 210 (1984). It effectively establishes a per se requirement that law enforcement officers seeking to speak to passengers on a bus must give *Miranda*-like warnings first, advising passengers of their right to refuse consent or terminate the encounter. And it deepens a disagreement among the courts of appeals that has arisen in the wake of *Bostick*. The question of when a police-citizen encounter on a bus or other means of public transportation becomes a "seizure" within the meaning of the Fourth Amendment is important and recurring, because interviews such as those that occurred in this case are a significant law enforcement tool to prevent crime and protect the public on those facilities. Accordingly, this Court's review is warranted.

A. The Court of Appeals' Decision Departs From This Court's Precedents On When A Police-Citizen Interaction Is Consensual

1. The Fourth Amendment protects against unreasonable "seizures." U.S. Const. Amend. IV. This Court has repeatedly addressed whether, and under what circumstances, a police-citizen encounter rises to the level of a Fourth Amendment "seizure." In *Terry* v. *Ohio*, 392 U.S. 1 (1968), the Court held that a "seizure" occurs "[o]nly when [an] officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen." *Id.* at 19 n.16; see *California* v.

Hodari D., 499 U.S. 621, 625-626 (1991). As long as a reasonable person would feel free "to disregard the police and go about his business," *Hodari D.*, 499 U.S. at 628, the encounter is purely consensual and beyond the reach of the Fourth Amendment. This Court has routinely applied that principle in a variety of settings to conclude that law enforcement officers may approach individuals whom they have no reason to suspect of wrongdoing and ask them questions, *Florida* v. *Rodriguez*, 469 U.S. 1, 5-6 (1984) (per curiam); ask to examine their identification, *United States* v. *Mendenhall*, 446 U.S. 544, 557-558 (1980); and request consent to search their luggage, *Florida* v. *Royer*, 460 U.S. 491, 501 (1983) (plurality opinion).

In *Bostick*, *supra*, this Court considered the application of that principle in the context of bus interdiction efforts. Federal, state, and local law enforcement authorities often station police officers at "airports, train stations, and bus depots," and "[l]aw enforcement officers stationed at such locations routinely approach individuals, either randomly or because they suspect in some vague way that the individuals may be engaged in criminal activity, and ask them * * * questions"; sometimes, they also ask for consent to perform searches. *Bostick*, 501 U.S. at 431. *Bostick* itself concerned the Broward County Sheriff's Department's practice of boarding buses at scheduled stops and asking passengers for permission to search their luggage for narcotics. The Florida Supreme Court had adopted a per se rule that all police-citizen encounters occurring in the "cramped confines" of a bus are impermissible suspicionless seizures, and that any passenger's consent to a search of the passenger's possessions in that context is automatically involuntary. Reversing that decision, this Court emphasized two

central points. First, the determination of whether a seizure occurs must be based on a "consider[ation] [of] all the circumstances surrounding the encounter," rather than bright-line rules. 501 U.S. at 439. The location of the questioning—the "cramped confines of a bus"—is a permissible, but not a dispositive, factor in this calculus. *Id.* at 435. Second, the Court reiterated that, "[s]ince *Terry*, we have held repeatedly that mere police questioning does not constitute a seizure," 501 U.S. at 434, and that "law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, [or] by putting questions to him if the person is willing to listen." *Ibid.* (quoting *Royer*, 460 U.S. at 497).

The court of appeals' decision in this case represents a marked deviation from this Court's teachings. The court of appeals held that its earlier decisions in *United States* v. *Guapi*, 144 F.3d 1393 (11th Cir. 1998), and *United States* v. *Washington*, 151 F.3d 1354 (11th Cir. 1998), "compelled" the conclusion that the one-on-one police-citizen encounter in this case constituted a Fourth Amendment seizure. That determination, however, contravened "a long, unbroken line of decisions dating back more than [30] years" that allows "police officers [to] approach individuals as to whom they have no reasonable suspicion and ask them potentially incriminating questions" without effectuating a seizure. *Bostick*, 501 U.S. at 439. *Bostick* expressly refused to carve out an exception for encounters that occur on a bus simply by virtue of the location of the encounter. The principle that officers may engage citizens in consensual conversations without effectuating a seizure, the Court held, "applies equally to encounters on a bus." *Id.* at 439-440.

The court of appeals' decision in this case effectively converts almost all police-citizen interactions on a bus into seizures, *unless* the police specifically warn the passenger that he has the right to refuse cooperation. In finding a seizure, the court of appeals principally relied on the fact that Officer Lang began the encounter by identifying himself as a police officer and explaining that he was conducting drug and weapons interdiction. Such conduct, the court explained, constitutes a "show of authority" like the general announcements from the front of the bus that were found to be coercive in *Washington* and *Guapi*. App., *infra*, 6a-7a. An officer's introduction of himself and announcement of his law-enforcement mission, however, is not by itself a sufficient basis for finding a seizure, even when that occurs on a bus. A seizure occurs only if an officer *invokes* his legal authority by issuing commands or otherwise communicating to the citizen that he is not free to go or to decline cooperation, and thereby restrains the citizen's liberty. See, *e.g.*, *United States* v. *Alarcon-Gonzalez*, 73 F.3d 289 (10th Cir. 1996) (order to "freeze"). *Bostick* makes that clear. The Court stated there that the police may not "demand of passengers their 'voluntary' cooperation" through "an '*intimidating* show of authority,'" such as pointing their weapons at citizens or otherwise engaging in misconduct that might overbear the passengers' will. 501 U.S. at 438. But merely identifying oneself and showing a badge, so that the citizen understands that he is communicating with the police rather than a random stranger, does not constitute coercion.

Before the decision in this case, the Eleventh Circuit specifically distinguished between one-on-one interactions on a bus, on the one hand, and general announcements made by the police over a loudspeaker

from or at the front of the bus, on the other. General announcements, the court explained, might create an element of coercion that one-on-one encounters do not. See *Guapi*, 144 F.3d at 1396. In this case, however, the court of appeals dismissed that distinction as *dictum* and treated *every* police-citizen interaction on a bus that begins with the officer identifying himself as inherently coercive. App., *infra*, 7a & n.5. Introducing oneself as a police officer to individual passengers, the court stated, is no "less coercive than a general bus-wide" announcement. *Id.* at 7a.

The suggestion that the police necessarily intimidate citizens when they identify themselves as police in one-on-one interactions is contrary to this Court's precedents, which have repeatedly found such interactions to be consensual. In *Florida* v. *Rodriguez*, 469 U.S. 1, 4-6 (1984) (per curiam), for example, the Court stated that an encounter in which the officer "showed his badge and asked respondent if [he] might" step aside and talk with him and another officer was "clearly the sort of consensual encounter that implicates no Fourth Amendment interest." And in *INS* v. *Delgado*, 466 U.S. 210 (1984), INS agents wearing badges and carrying firearms moved through a private factory, identified themselves as they approached individual employees, and asked those employees questions. *Id.* at 212, 217-221. This Court concluded that the agents' conduct did not effectuate a seizure, because it did not create "circumstances * * * so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave" unless he cooperated. *Id.* at 216. The same is true here. There was nothing about Officer Lang's introduction of himself and explanation of his purpose that would have created such intimidation as to lead reasonable people to believe that they could

neither refuse cooperation nor leave. As the district court found, "everything that took place between Officer Lang and Mr. Drayton and Mr. Brown suggests that it was cooperative. There was nothing coercive, there was nothing confrontational about it." App., *infra*, 13a (3/16/99 Tr. 107).

The other factor relied on by the court of appeals—the presence of a single officer in the bus driver's seat, near the exit, looking backward to ensure officer safety, App., *infra*, 3a, 9a—similarly cannot support the finding of a seizure. There were multiple officers stationed near the exits of the factory in *Delgado*, yet this Court expressly rejected the suggestion that their presence converted the otherwise consensual interactions within the factory into seizures. 466 U.S. at 217-218. The plaintiffs there claimed "that the stationing of agents near the factory doors showed the INS's intent to prevent people from leaving." *Id.* at 218. Rejecting that claim, the Court explained that "there is nothing in the record indicating that this is what the agents at the doors actually did." *Ibid.* Indeed, the Court continued, "[t]he obvious purpose of the agents' presence at the factory doors was to insure that all persons in the factories were questioned." *Ibid.* Thus, the Court concluded, "[t]he presence of agents by exits posed no reasonable threat of detention to" the factory workers and "the mere possibility that they would be questioned if they sought to leave * * * should not have resulted in any reasonable apprehension by any of them that they would be seized or detained in any meaningful way." *Id.* at 219. The court of appeals offered no reason why *Delgado*'s analysis does not apply with equal force here.

2. The court of appeals' decision also contravenes this Court's precedents by effectively establishing a per

se requirement that, for an encounter on a bus to be found consensual, officers must afford passengers *Miranda*-like warnings of their right to refuse cooperation. In *Washington*, for example, the court declared that cooperation would not be found voluntary absent "some positive indication that consent could be refused." 151 F.3d at 1357. Indeed, for that reason, Judge Black dissented in *Washington*, criticizing the decision as establishing a de facto "per se rule" that officers must explicitly advise passengers that they have the right to refuse consent. *Id.* at 1357-1358.

Before the decision in this case, it was possible to disagree with Judge Black's reading of Eleventh Circuit case law. The Eleventh Circuit had disavowed any intention of creating a per se warning requirement in *Washington* and *Guapi*. See *Guapi*, 144 F.3d at 1395 (acknowledging that the Court "has steadfastly rejected the notion of imposing *per se* rules" in this context and had "specifically rejected the notion that police officers must always inform citizens of their right to refuse when seeking permission to conduct a warrantless consent search"); *Washington*, 151 F.3d at 1357 (the "Supreme Court has steadfastly rejected the notion of imposing *per se* rules."). The decisions, moreover, could be read as restricting the warning requirement to those situations in which police conduct, such as announcements made from the front of the bus or blocking the aisle, might otherwise be thought coercive. *Guapi*, 144 F.3d at 1395; *Washington*, 151 F.3d at 1357. The decision in this case, however, renders that reading of Eleventh Circuit precedent untenable. Heeding the guidance of *Washington* and *Guapi*, the officers in this case made no statement from the front of the bus, coercive or otherwise. They were careful to avoid blocking the aisle. And they ensured

that nothing they said to the individual passengers communicated the message that cooperation was required. See App., *infra*, 3a (noting officer's quiet tone); *id.* at 14a (3/16/99 Tr. 107-108) ("There was nothing coercive and nothing in what Officer Lang said or did or the other officers did on that bus that would suggest to a reasonable person that they were not free to leave."). Nonetheless, the court of appeals concluded that a reasonable person still "would not have felt free to disregard [the officer's] requests without some positive indication that consent could have been refused." App., *infra*, 6a. If consent to search under these circumstances is necessarily the product of "coercion" absent a specific warning of the right to refuse consent, it is difficult to see when officers could ever avoid giving such warnings to bus passengers.

That result cannot be reconciled with this Court's cases. As this Court has explained, express knowledge of the right to refuse consent is not a prerequisite to a valid consent, and officers need not advise individuals of their Fourth Amendment rights. See, *e.g.*, *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 248-249 (1973) ("[W]hile the subject's knowledge of a right to refuse [to consent] is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent."); *id.* at 231 (an advice-of-rights requirement "has been almost universally repudiated by both federal and state courts, and, we think, rightly so."); accord *United States* v. *Watson*, 423 U.S. 411, 424-425 (1976); *United States* v. *Matlock*, 415 U.S. 164, 167 n.2 (1974); see also *Mendenhall*, 446 U.S. at 555 ("Our conclusion that no seizure occurred is not affected by the fact that the respondent was not expressly told by the agents that she was free to decline to cooperate with their inquiry,

for the voluntariness of her responses does not depend upon her having been so informed.").

While the officer in *Bostick* did advise passengers of their right to refuse consent, the agents in *INS* v. *Delgado*, *supra*, gave no such warnings, even though the factory workers in that case were questioned in the limited confines of the workplace, with armed government agents posted near the exits. Yet this Court concluded that the questioning did not effectuate a seizure. Similarly, in *Ohio* v. *Robinette*, 519 U.S. 33 (1996), this Court rejected the Ohio Supreme Court's holding that the Fourth Amendment required a police officer to advise a person, who had been lawfully detained for a traffic stop, that he was "free to go" before his consent to the officer's request to search his car could be recognized as voluntary. In so holding, the Court emphasized that "we have consistently eschewed bright-line rules" in the Fourth Amendment context, and explained that *Schneckloth* had "previously rejected a per se rule very similar" to the one adopted by the state supreme court in that case. 519 U.S. at 39. The per se warning requirement effectively imposed by the decision below cannot be reconciled with those precedents.

B. The Court of Appeals' Holding Reflects A Significant Disagreement In the Courts Of Appeals Concerning The Legality of Police-Citizen Interactions On Buses

The decision of the court of appeals establishes a conflict among the circuits on a recurring question of increasing importance. Two other courts of appeals have considered the court of appeals' underlying decisions in *Washington* and *Guapi*, which were deemed controlling in this case, and they have reached dia-

metrically opposite conclusions. In *United States* v. *Broomfield*, 201 F.3d 1270, 1275, cert. denied, 531 U.S. 830 (2000), the Tenth Circuit rejected the analysis of *Washington*. In contrast, in *United States* v. *Stephens*, 206 F.3d 914, 918 (2000), the Ninth Circuit endorsed it.

In *Broomfield*, a DEA agent boarded a bus during a scheduled stop and proceeded to the rear of the bus, where he "identified himself to [the defendant] both verbally and by showing his badge." 201 F.3d at 1272, 1275. After agreeing to speak with the agent, the defendant eventually consented to the agent's request to search his gym bag, and the agent uncovered cocaine base. Even though the agent in that case, like the officer in this one, "displayed his badge and did not inform [the defendant] of the right to refuse consent," the court found it dispositive that he, like the officer here, "spoke * * * in an even tone * * * and made no coercive or threatening gestures or comments." *Id.* at 1275. See pp. 3-4, 14, *supra* (Officer Lang spoke politely, in a voice just loud enough to be heard, and there was no evidence that any passenger could tell that the officers were armed). There was "no evidence," the Tenth Circuit concluded, that the agent had "conveyed the message that compliance with his requests was required." 201 F.3d at 1275. Precisely the same is true here. The Eleventh Circuit nonetheless held that the one-on-one encounter between Officer Lang and respondents was coercive and rendered respondents' consent involuntary.

In *Broomfield*, there was no officer at the front of the bus, while in this case there was. As this Court explained in *Delgado*, however, "[t]he presence of agents by exits pose[s] no reasonable threat of detention to" citizens and "the mere possibility that they would be questioned if they sought to leave * * * should not

have resulted in any reasonable apprehension by any of them that they would be seized or detained in any meaningful way." 466 U.S. at 219. In any event, the officer's position in *Broomfield* was, if anything, *more* prone to produce coercion than the positions of the officers in this case, because the officer in *Broomfield* partially obstructed the defendant's ability to exit the bus. See 201 F.3d at 1275. But the Tenth Circuit found that consideration insufficient to show that the officer sent a message to passengers that compliance with his requests was required. *Ibid.*

The courts of appeals have expressly recognized the conflict between the Tenth and Eleventh Circuits in bus interdiction cases. In *Broomfield*, the Tenth Circuit specifically refused to follow the Eleventh Circuit's cases. The "soundness of the *Washington* opinion," the Tenth Circuit explained, is "questionable" because it effectively "creat[es] a per se rule that authorities must notify bus passengers of the right to refuse consent before questioning those passengers and asking for consent." 201 F.3d at 1275. The court further observed that, "[s]hort of telling the passengers of the right to refuse consent, it is difficult to conceive of any actions the[] officers could have taken to make th[e] search any more reasonable." *Ibid.* (quoting *Washington*, 151 F.3d at 1358 (Black, J., dissenting)). The Eleventh Circuit has also acknowledged the express disagreement between the circuits, noting in this case that *Washington* "has been criticized by the Tenth Circuit, which has declined to follow it." App., *infra*, 2a n.2. Yet the court declined to make any effort to reconcile the decisions.[1]

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[1] The petition for a writ of certiorari in *Broomfield* alleged a conflict between the decision there and the Eleventh Circuit's

While the Tenth Circuit has rejected *Washington* and its progeny, the Ninth Circuit has embraced them. Two months after *Broomfield* was decided, the Ninth Circuit followed *Washington* in *United States* v. *Stephens*, *supra*. There, the Ninth Circuit concluded that three officers had seized the passengers on a bus when they boarded the bus and announced, from the front, that "[n]o one is under arrest, and you are free to leave. However, we would like to talk to you." 206 F.3d at 917. In finding a seizure, the court relied on the purported Hobson's choice created by the announcement—either stay on the bus and consent, or get off the bus and risk drawing attention to yourself—and the officer's failure to advise the passengers of the option of staying on the bus but declining to consent. *Ibid.* Judge Sneed dissented, and Judge O'Scannlain, joined by Judges T.G. Nelson and Kleinfeld, dissented from the court's order denying rehearing banc. They noted the conflict between the Tenth and Eleventh Circuits, and expressed their view that the Ninth Circuit had placed itself on the wrong side of the debate. The majority opinion in *Stephens*, they explained, had

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decisions in *Guapi* and *Washington*. The government opposed the petition on the ground that the cases were factually distinguishable in several respects, one of which was that *Broomfield* involved a one-on-one encounter, whereas *Guapi* and *Washington* involved general announcements. See U.S. Br. in Opp. at 10-13, No. 99-9188. The government likewise opposed the petition for a writ of certiorari in another Tenth Circuit case, *United States* v. *Hill*, 199 F.3d 1143 (1999), cert. denied, 531 U.S. 830 (2000), which also cited *Guapi* and *Washington*, on the ground that the cases were too factually dissimilar to pose a square conflict. U.S. Br. in Opp. at 14-18, No. 99-9245. The court of appeals' decision in this case, which involves a one-on-one encounter, has eliminated any basis for meaningfully distinguishing *Broomfield*. Consequently, this Court's review is now warranted.

"create[d] a per se rule" like the one created by the Eleventh Circuit in *Washington*. *United States* v. *Stephens*, 232 F.3d 746, 747 (9th Cir. 2000) (dissent from denial of rehearing en banc). The imposition of that requirement, they added, is "precisely contrary to Supreme Court precedent," including *Bostick* and *Schneckloth*. *Ibid.* Declaring that "*Washington* is of dubious validity at best," the dissenters concluded that the panel's decision to follow it rather than *Broomfield* "foment[s] a circuit split over an issue that the Supreme Court has already resolved." *Id.* at 748.

Indeed, the Eleventh Circuit's holding here conflicts with pre-*Bostick* circuit precedent as well. In *United States* v. *Flowers*, 912 F.2d 707 (1990), cert. denied, 501 U.S. 1253 (1991), the Fourth Circuit held that encounters like the one in this case do not effect seizures. In that case, like this one, multiple officers boarded a bus to interdict guns and drugs. There, as here, they spoke to the bus passenger "in a casual tone of voice," did "not block the aisle," and did not "display[] weapons or restrain[] [the passenger] in any way." *Id.* at 711. Under the circumstances, the Fourth Circuit concluded that no seizure had occurred. *Id.* at 709, 712. "Nothing about the officers' conduct here impaired [the passenger's] right to refuse to talk to them or to leave the bus." *Id.* at 709. There is no principled basis for distinguishing this case from *Flowers*. The only difference between the two cases is the circuit in which they arose. The division in circuit authority warrants this Court's review.

C. The Court's Guidance Is Required To Clarify The Boundaries of Lawful Police Conduct In Interdiction Programs

The Fourth Amendment issue in this case is significant and recurring.[2] While this Court resolved one issue in *Bostick*, the conflicting appellate decisions discussed above have left law enforcement officers at the federal, state, and local levels without clear guidance on the boundaries of lawful bus, train, and airplane interdiction practices. The court of appeals' decision, moreover, has exacted—and will continue to exact—significant social costs by requiring the suppression of reliable and probative evidence and by preventing officers from engaging in otherwise consensual encounters with citizens.

Programs that rely on consensual interactions between police officers and citizens on means of public transportation are an important part of the national effort to combat the flow of illegal narcotics and weapons. In the current environment, they may also become an important part of preventing other forms of criminal activity that involve travel on the nation's system of public transportation. The court of appeals'

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[2] This issue has arisen repeatedly not only in the published decisions cited in text, but in numerous unpublished decisions. For example, in three unpublished decisions, the Eleventh Circuit has concluded that *Washington* required the suppression of evidence obtained through a bus passenger's consent, even though each of those cases involved one-on-one interactions between the officers and the passengers and, unlike in *Washington*, the officers did not make a general announcement from the front of the bus. See Gov't C.A. Pet. for Reh'g En Banc at 2-3 & Attach. B, C, and D (copies of decisions). Given the recurring nature of these fact patterns, the issue is of continuing importance.

ruling, if left intact, poses a direct threat to the continued efficacy of this law enforcement technique.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 2001

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 99-13814, 99-15152

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

CHRISTOPHER DRAYTON & CLIFTON BROWN, JR.,
DEFENDANTS-APPELLANTS

Oct. 24, 2000

OPINION

Before CARNES and BARKETT, Circuit Judges, and POLLAK*, District Judge.

CARNES, Circuit Judge:

This is another in a series of cases involving warrantless searches of bus passengers. *See generally United States v. Washington*, 151 F.3d 1354 (11th Cir. 1998); *United States v. Guapi*, 144 F.3d 1393 (11th Cir. 1998). As a result of the searches involved in this case Christopher Drayton and Clifton Brown, Jr. were each convicted of conspiring to distribute cocaine and

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* Honorable Louis H. Pollak, U.S. District Court Judge for the Eastern District of Pennsylvania, sitting by designation.

possessing cocaine with intent to distribute, in violation of 21 U.S.C. §§ 841 and 846. They appeal, contending that the district court erred in denying their motions to suppress the cocaine found in the search of their persons.[1]

The only issue before this Court is, as we put it in *Washington*, 151 F.3d at 1355, whether the consent given by each defendant for the search was "uncoerced and legally voluntary" under the Fourth Amendment. Because the facts of this case are not distinguishable in a meaningful way from those in *Washington*, we are compelled by that decision to hold that these defendants' consent was not sufficiently free of coercion to serve as a valid basis for a search.[2]

I. FACTUAL BACKGROUND

On February 4, 1999, a bus containing about 25 to 30 passengers en route from Ft. Lauderdale to Detroit made a scheduled stop at a Greyhound bus station in

[1] Drayton and Brown were convicted and appealed separately, but we have consolidated their appeals because the facts, which were developed at a joint hearing on their motions to suppress, are identical.

[2] The *Washington* decision has been criticized by the Tenth Circuit, which has declined to follow it. *See United States v. Broomfield*, 201 F.3d 1270, 1275 (10th Cir. 2000) (characterizing *Washington* as, in effect, having "creat[ed] a per se rule that authorities must notify bus passengers of the right to refuse consent before questioning those passengers and asking for consent to search luggage," which "renders the soundness of the *Washington* opinion questionable"); *accord Washington*, 151 F.3d at 1358 (Black, J., dissenting). We do not have any occasion to pass on that criticism, and express no view concerning it, because we are bound by the prior panel decision in *Washington* in any event. *Wascura v. Carver*, 169 F.3d 683, 687 (11th Cir. 1999).

downtown Tallahassee, Florida. During the stop, all of the passengers were required to exit the bus temporarily for reasons unrelated to law enforcement. As the passengers re-boarded, the driver checked their tickets before leaving to handle paperwork in the bus terminal office. Before the driver left for the terminal office, three members of the Tallahassee Police Department received permission from him for them to board the bus while the passengers were seated and waiting to depart. The officers were dressed casually and their badges were either hanging around their necks or held in their hands. They wore their guns in side-holsters, which were covered by either a shirt or jacket. There is no evidence to indicate that any passenger ever saw that the officers were armed.

Once on board the bus the officers did not make any general announcements to the passengers nor did they hold up their badges for all of the passengers to see. Officers Lang and Blackburn made their way to the back of the bus, while Officer Hoover knelt in the bus driver's seat, facing toward the rear of the bus in order to observe the passengers and ensure the safety of the other officers. In that position, Hoover could see the passengers and they could see him.

Officers Lang and Blackburn went to the back of the bus and started working their way forward, asking passengers where they were traveling from, and attempting to match passengers to the luggage in the overhead rack. The officers did not block the aisle, but instead stood next to or behind the passengers with whom they were talking. According to Lang's testimony, passengers who declined to have their luggage searched or who wished to exit the bus at any time

would have been permitted to do so without argument.[3] In similar bus searches conducted by Lang over the past year, five to seven passengers declined to have their luggage searched, and an unspecified number of other passengers exited the bus during the searches.

Defendants Drayton and Brown were seated next to each other a few rows from the rear of the bus on the driver's side, with Drayton in the aisle seat and Brown next to the window. After examining the rear of the bus, Lang approached the defendants from behind and leaned over Drayton's shoulder. He held up his badge long enough for the defendants to see that he was a police officer and, with his face 12-18 inches away from Drayton's face, Lang spoke in a voice just loud enough for the defendants to hear. He told them:

> I'm Investigator Lang with the Tallahassee Police Department. We're conducting bus interdiction, attempting to deter drugs and illegal weapons being transported on the bus. Do you have any bags on the bus?

Both of the defendants responded by pointing to a green bag in the overhead luggage rack. Lang asked, "Do you mind if I check it?," to which Brown responded, "Go ahead." Lang handed the bag to Officer Blackburn to check. He did check it, and no contraband was found in the bag.

Officer Lang had noticed that both defendants were wearing heavy jackets and baggy pants despite the fact that it was a warm day, and he thought that they were

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[3] Officer Lang was the only witness to testify at the joint hearing on the defendants' motions to suppress.

overly cooperative during the search. So Lang requested and received permission from Brown to conduct a pat-down search of his person for weapons. Brown leaned up in his seat, pulled a cell phone out of his pocket, and opened up his jacket. Lang then reached across Drayton and patted down Brown's jacket and pockets, including his waist area, sides, and upper thighs. In both thigh areas, Lang detected hard objects which were inconsistent with human anatomy but similar to drug packages he had found on other occasions. Lang arrested and handcuffed Brown, and Officer Hoover escorted Brown off the bus.

Lang next turned to Drayton and asked, "Mind if I check you?" Drayton responded by lifting his hands approximately eight inches off of his legs. Lang conducted a similar pat-down of Drayton's thighs. When Lang detected hard objects on Drayton's thighs similar to those he had felt on Brown, Drayton was arrested and escorted off the bus.

Once the defendants were off the bus, Lang unbuttoned their trousers and found plastic bundles of powder cocaine duct-taped between several pairs of boxer shorts. Drayton had two bundles containing 295 grams of cocaine, and Brown had three bundles containing 483 grams of cocaine.

II. DISCUSSION

This case is controlled by our decision in *United States v. Washington*, 151 F.3d 1354 (11th Cir. 1998), which extended *United States v. Guapi*, 144 F.3d 1393

(11th Cir. 1998).[4] In *Washington*, federal agents searched passengers on a bus after it had made a scheduled stop. *See* 151 F.3d at 1355. The search revealed cocaine concealed in the pants of one of the passengers. *See id.* at 1356. Concluding that the facts and circumstances surrounding the search indicated that "a reasonable person . . . would not have felt free to disregard [the agents'] requests without some positive indication that consent could have been refused," this Court held that the search violated the Fourth Amendment's prohibition against unreasonable searches and seizures. *See id.* at 1357.

We do not believe that any of the factual differences between this case and *Washington* are material. One factual difference is that the officers in this case spoke to the passengers only individually, unlike in *Washington* where an officer stood up in front of the bus, with his badge held over his head, and announced to all of the passengers that the agents were about to conduct a routine bus check. *See id.* at 1355; *Guapi*, 144 F.3d at 1394 (reciting police officer's announcement to the whole bus). The government argues that the lack of a "show of authority" in the form of an announcement to all the passengers distinguishes this case from *Washington*.

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[4] Our holding is consistent with *United States v. Hill*, 228 F.3d 414 (11th Cir., July 24, 2000) (unpublished opinion), a case that is factually indistinguishable from this one, which concluded that *Washington* compels a suppression of the evidence given these facts. Although *Hill* is an unpublished opinion and therefore not binding precedent, we do find its analysis of *Washington's* application persuasive. *See* 11th Cir. R. 36-2.

We disagree. Although there was no general show of authority at the front of the bus in this case, there was a specific show of authority passenger-by-passenger. Officer Lang approached the defendants with his badge held up in his hand, leaned over with his face 12-18 inches from Drayton's, and told the defendants that he was conducting a bus interdiction, looking for drugs and illegal weapons. We do not believe that a passenger-specific show of authority is any less coercive than a general bus-wide one.[5] Moreover, the general announcement made by the agent in *Washington* included the statement that, "No one is under arrest or anything like that, we're just conducting a routine bus check." 151 F.3d at 1355. There was no such reassurance in this case.

Another difference between *Washington* and this case is that Officer Lang did not have the defendants display their tickets or photo identification before he conducted the search. *See id.* at 1355-56. Apparently, the reason the officers in *Washington* asked to see tickets and identification was to look for suspicious circumstances, but we do not see how the failure to ask for such documents affects whether other requests or commands are coercive. *See Guapi*, 144 F.3d at 1393-94, 1397 (finding bus search coercive even though officers did not request defendant's ticket or identification).

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[5] In *Guapi*, the Court stated that when officers individually approach passengers and communicate an intention to conduct a search, instead of making a general announcement, there is "no reason to believe . . . that they are coercing or intimidating citizens." 144 F.3d at 1396. Those were not the facts in *Guapi*, however, so the statement is only dicta, and we are not persuaded by it.

A third difference involves the record relating to instances in which Officer Lang had searched other buses. Lang testified that during the past year five to seven people had declined to have their luggage searched, and that passengers had often exited the bus while the officers were on it. If there was any similar information in the record in *Washington*, the opinion does not indicate it. Nonetheless, the existence of that information in this case fails to distinguish it from *Washington*. Officer Lang did not testify that the statements the officers made and the methods they used in the searches where passengers declined to give consent or exited the bus were the same as in this case. *See also Guapi*, 144 F.3d at 1396 (although the officer could recall several times where passengers had previously refused his search requests, "It is undisputed that in the instant circumstances no passengers refused the search"). Not only that, but according to Lang's testimony, he had searched approximately eight hundred buses in the past year. Even if Lang spoke with only three or four passengers per bus, six or seven refusals out of hundreds of requests is not very many.[6]

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[6] The government also argues that this case is distinguishable from *Washington* due to the background and experience of the defendants. The government points out that Drayton was 26 years old, was employed for six of the previous eight years, and had experience with law enforcement in connection with previous drug charges, and that Brown was 29 years old and had previously been employed for three years as a correctional officer. However, we reject that purported distinction, because the test is an objective one. *See Florida v. Bostick*, 501 U.S. 429, 438, 111 S. Ct. 2382, 2388, 115 L.Ed.2d 389 (1991) ("whether a reasonable person would have felt free to decline the officers' requests"); *Washington*, 151 F.3d at 1357.

One final factual difference between this case and *Washington* actually cuts in the defendants' favor. Here, after the three officers boarded the bus, one of them remained at the front, kneeling in the bus driver's seat in view of the passengers. Seeing an officer stationed at the bus exit during a police interdiction might make a reasonable person feel less free to leave the bus. *See United States v. Hill*, 228 F.3d 414 (11th Cir., July 24, 2000) (unpublished opinion) ("The presence of an officer at the exit, even if not so intended, is an implication to passengers that the searches are mandatory."); *Washington*, 151 F.3d at 1358 (Black, J., dissenting) (emphasizing absence of officer at front of bus in that case); *see also Guapi*, 144 F.3d at 1396 (noting that the exit was blocked by police officers).

III. CONCLUSION

For the reasons we have explained, we conclude that the outcome of this case is controlled by our decision in *Washington*, which requires that we reverse the convictions of these two defendants and remand with instructions that the district court grant their motions to suppress.

REVERSED AND REMANDED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

Case No. 4:99cr15-WS

THE UNITED STATES OF AMERICA, PLAINTIFF

vs.

CHRISTOPHER DRAYTON AND CLIFTON BROWN,
DEFENDANTS

March 16, 1999

TRANSCRIPT OF HEARING
ON MOTION TO SUPPRESS BEFORE THE
HONORABLE WILLIAM STAFFORD
SENIOR UNITED STATES DISTRICT JUDGE

* * * * *

[104] THE COURT: All right. In this case I find that there was no violation of the defendant's constitutional rights, and that the police conduct was not coercive and that the search was therefore voluntary on the part of the Defendants Brown and Drayton. And I base that upon my consideration of the totality of the circumstances, and of course having heard the only witness in this case testify.

I don't think the facts are much in dispute. It's very clear that the bus was traveling from south to north through Tallahassee going somewhere either north or west, perhaps both, out of Tallahassee. This was a stop along the way. The passengers were required to exit the bus by the bus company. And then after the passengers got back on board—that is those who were continuing on their travels and those who were boarding new in Tallahassee boarded—then the three officers, Mr. Lang, Mr. Hoover and Mr. Blackburn, boarded the bus.

Again, Hoover apparently at the front, then kneeling, as I guess I can—on his knees, in the driver's seat, looking aft, to check and make sure that there was no threat to the officers whose backs were turned. Mr. Blackburn goes to the back of the bus and—to check the restroom and the passenger on that rear bench seat.

Mr. Lang, who testified, starts working the bus from the back forward. In the—I guess what might be the first full row of seats, the defendants, Mr. Brown and Mr. Drayton, were [105] seated. The badge was either pulled out from his chain around his neck or handed to him by Mr. Lang. He was walking forward and leaning over from the rear of the passengers, rather than standing in the aisle blocking their way.

There was no general announcement when these officers got on the bus. There was no brandishing of the badges by these officers when they boarded the bus. They came on and they could have or could not have been—and I don't think it makes any difference—but easily could have been distinguished or indistinguishable from other passengers who may have boarded late. But whatever, they were the last ones on the bus.

And as in Bostick, the people who were on that bus were on there because they wanted to be on that bus. They were going someplace from Tallahassee. It was not as if the police or the bus company herded them, did a sweep through the lobby of the terminal and put everybody on the bus and then let the police come on board and work the bus. These people were on because they wanted to be on the bus.

So if, as in the words of Florida against Bostick—the Supreme Court case, 501 U.S. 429, decided June 20, 1991—Mr. Brown and Mr. Drayton were in no different position than Bostick was, who was on that bus, and the bus was ready to leave. So we start from that premise. They were on that bus, they were in that confined location by their choice.

The officer—Investigator Lang did not tell him, and he [106] does not make that suggestion here, nor does the government, that he was required—he does not tell them that they don't have to consent.

And I think that's what Bostick says, at least that's what the Court of Appeals of the Eleventh Circuit, Judge Roney, who wrote both of these opinions for the majority, says: "Although we reject the notion of a per se rule requiring bus passengers to be informed of their constitutional rights"—and then it goes on [to] say, we have to—except for the use of the word "police officers" in Guapi, and the use of the word "federal agents" in Washington, that paragraph of Judge Roney's opinion is identical. It contains the same language. It came out of the same word processor, and well it should because that's how—that's, I guess, a correct statement of the law.

And so we are then—whatever we may think about that rubric, whatever we may think that it might be easier on these cases if the police had taken the three to five seconds say, "Now of course you folks don't have to consent, it's entirely up to you," there's nothing in the law that says they have to do that. So we look at the totality of the circumstances.

This is an officer who approaches these men from the back. There is no one standing in their way. He is coming to them from their rear. He leans over—and it's obvious that they can get up and leave, as can the people ahead of them. If his speech is as it was on the stand, there is nothing in his tone [107] of voice that suggests that this is some abusive bully type individual. He is a black or African American man talking to two other black—black or African American men on this bus. He leans forward, and either from his chest chain or from his wallet shows them his badge and explains to them that he wants to—as his testimony was, that he's concerned about drugs and firearms.

Any everything that's said, everything that took place between Officer Lang and Mr. Drayton and Mr. Brown suggests that it was cooperative. There was nothing coercive, there was nothing confrontational about it. There is no evidence that there was somebody then standing in the aisle and say, you know, come if you want to.

And so none of the circumstances that existed in Guapi, G-U-A-P-I, U.S. against Guapi, 144 F.3d 1393, decided by the Eleventh Circuit on June 29, 1998—that's 144 F.3d 1393—nor in U.S. against Washington, decided by the same Eleventh Circuit, 151 F.3d 1354—that's 151 F.3d 1354—decided by the Court of Appeals on

August 28th, 1990, nothing in either—this case is unlike both of those cases.

Here there was no general announcement. Here there was nobody s..nding at the front of the bus. Here the passengers were already on, ready to leave. There was nothing coercive and nothing in what Officer Lang said or did or the other officers did on that bus that would suggest to a reasonable person that [108] they were not free to leave.

And so they're handing over their luggage, their on-board luggage. Their consent to the pat down leads me, as I've indicated, to believe that there was no violation of their constitutional rights. They consented to this search. I find that the government has met its burden on this case. I think that the government's response on Pages 16 and 17 fairly well sets forth the facts and the law that applies to the facts in this case.

Therefore, the evidence was lawfully seized by the police, and therefore the—and would be admitted in a trial of this case. And the motion to suppress is denied as to both defendants. And if upon reflection I need to put anything more on the record concerning my basis for this, I would allow myself to do so, but I think I've fairly well stated the basis for my decision.

* * * * *

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-13814 & 99-15152

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

versus

CHRISTOPHER DRAYTON & CLIFTON BROWN, JR.,
DEFENDANTS-APPELLANTS

[Filed: May 16, 2001]

On Appeal from the United States District Court for the Northern District of Florida

---

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC (opinion _____, 11th Cir., 19___, ____F.2d____).

Before CARNES and BARKETT, Circuit Judges, and POLLAK*, District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active-service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules

---

* Honorable Louis H. Pollak, U.S. District Court Judge for the Eastern District of Pennsylvania, sitting by designation.

of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ ED CARNES

UNITED STATES CIRCUIT JUDGE

No. 01-631

Supreme Court, U.S.
FILED
NOV 14 2001
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2001

UNITED STATES OF AMERICA, Petitioner

v.

CHRISTOPHER DRAYTON, Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Respondent, Christopher Drayton, asks leave to file the enclosed Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit without prepayment of costs and to proceed *in forma pauperis* in accordance with Supreme Court Rule 39, and Title 18, U.S.C., 3006A(d)(6). The filing of this petition is a continuation of the representation of the defendant under a Criminal Justice Act appointment of the Office of the Federal Public Defender for the Northern District of Florida, by the United States District Court. Supreme Court Rule 39 therefore does not require that any affidavit be filed with this motion.

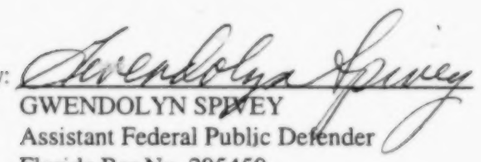
51 pp

WHEREFORE, Respondent, Christopher Drayton, prays for leave to proceed *in forma pauperis*.

Dated this November 14, 2001.

Respectfully submitted,

RANDOLPH P. MURRELL
FEDERAL PUBLIC DEFENDER

By: 

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No. 01-631

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2001

UNITED STATES OF AMERICA, Petitioner

v.

CHRISTOPHER DRAYTON and
CLIFTON BROWN, JR., Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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November 14, 2001

QUESTION PRESENTED FOR REVIEW

WHETHER THE COURT OF APPEALS HAS ADOPTED A *PER SE* RULE OR HAS APPLIED THE TOTALITY-OF-THE-CIRCUMSTANCES TEST APPROVED IN FLORIDA V. BOSTICK, 501 U.S. 429 (1992)?

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No. 01-631

IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA

OCTOBER TERM, 2001

UNITED STATES OF AMERICA, Petitioner,

v.

CHRISTOPHER DRAYTON and
CLIFTON BROWN, JR., Respondents.

BRIEF IN OPPOSITION

The Respondents, Messrs. Drayton and Brown, respectfully ask this Honorable Court to deny the petition for writ of certiorari sought by Petitioner to review the opinion and judgment of the United States Court of Appeals for the Eleventh Circuit, entered in the above-entitled proceeding on October 24, 2000.

OPINIONS BELOW

A published opinion of the United States Court of Appeals for the Eleventh Circuit is reported as United States v. Drayton, 231 F.3d 787 (11th Cir. 2000). The district court decision was unreported.

JURISDICTION

This Court's jurisdiction was invoked under 28 U.S.C. § 1254(1). After the court of appeals' Opinion on October 24, 2000, Petitioner's request for rehearing en banc was denied May 16, 2001. Petitioner was then granted until October 12, 2001, to file its petition.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ..

STATEMENT OF THE CASE

A. Course of Proceedings

Both Respondents were charged by indictment with Conspiracy to Possess Powder Cocaine, and with Possession of Powder Cocaine, with Intent to Distribute.

After evidentiary hearing, the district court entered oral findings and denied both Respondents' motions to suppress.

Mr. Drayton was found guilty on both counts after trial by jury, and Mr. Brown pled guilty to the conspiracy count.[1] The district court sentenced Mr. Drayton to 120 months imprisonment and eight years supervised release and Mr. Brown to 88 months imprisonment and five years supervised release.

---

[1]The government incorrectly cites Mr. Brown's first name and incorrectly identifies his plea and conviction as based on both counts. (Pet. at 2)

On direct appeal, the United States Court of Appeals for the Eleventh Circuit reversed the Respondents' convictions and remanded to the district court with instructions that the Respondents' motions to suppress be granted. The government's petition for rehearing en banc was denied, with no dissent. The government never filed a motion to stay.

On remand, the district court complied with the instructions of the court of appeals; it reversed the convictions and granted the motions to suppress. In addition, the district court ordered Respondents released from custody under pretrial supervision and granted the government's motion to stay further proceedings pending resolution of this petition.

B. Facts

The only testimony at the suppression hearing was from Investigator Rufus Lang of the Tallahassee Police Department (TPD), Tallahassee, Florida.

General Procedure for Drug Interdiction Stops at Bus Station

Inv. Lang had been involved in drug interdiction stops at the Greyhound Bus Station in Tallahassee for three years. He testified he is very polite and puts his "total focus" on the passenger. Attempting to demonstrate how he speaks just loud enough for the individual passenger, the record reflects that his voice could be heard throughout the courtroom.

Inv. Lang shows passengers his badge "so that they will know that [he is] the authority." The overwhelming majority of people believe they have a duty to cooperate with him and are cooperative. Although Inv. Lang did not tell passengers on the date in question that they could refuse to be searched, he has in the past said something like, "You do have a right to refuse, but I would like for your cooperation."

Although Inv. Lang testified that the officers never delayed a bus's departure, he also testified that "they give us an opportunity to check each and every bus that's coming from the south."[2] The officers board "maybe three" buses arriving at 5:00 a.m. and four or five buses arriving at Noon; the searches are generally conducted three to four days a week. They are on each bus 15 to 20 minutes and usually check two to three people.

Inv. Lang tells the passenger on whom he is focused that he wants to search his/her bag and then immediately proceeds to ask if he/she has a bag. He never asks it as a question, e.g., "Will you cooperate?"

Statistics

The defense noted that, based on Inv. Lang's testimony, he would have searched 1,040 buses in one year. In the past year, Inv. Lang estimated that five or six people, "not very many," refused to consent to a search. Given his estimated average of 25 people per bus, in three years the officers would have had the opportunity to interact with 78,000 passengers, out of which only five or six had refused – less than 1/100th of one percent. In the past year, he recalled arresting 13 or 14 people at the bus station carrying drugs.

[2]Inv. Lang testified they focus on passengers from south Florida. More than one court has questioned whether agent testimony as to "source cities" is reliable. See, United States v. Grant, 920 F.2d 376, 386 (6th Cir. 1990). The government acknowledged to the district court that bus passengers are "generally economically disadvantaged." "They need to go somewhere, and that's the only way they've got to get there."

Respondents' Search and Arrest

On February 4, 1999, three[3] TPD officers boarded a bus. The bus had come from Ft. Lauderdale and was going to Detroit, Michigan. Inv. Lang thought there were about 25 to 30 passengers that day. Bus company policy requires all passengers to deboard in this situation.

After the passengers reboarded for departure, the bus driver finished checking their tickets and exited the bus. The driver went to handle paperwork in the terminal office. The three officers asked his permission and boarded the bus once the passengers were seated. They did not make a general announcement or hold up their badges for everyone to see. They did not tell passengers they could refuse to be searched or had a right to leave the bus.

The three officers were dressed casually, with their police badges either hanging around their necks or held in their hands. After showing his badge to the individual passenger, the badge either falls back on the chain or is placed in his pocket. Inv. Lang and the two other officers wore their guns in holsters on their sides, but he testified they were covered by either a shirttail hanging out or a jacket; he did not remember specifically what he wore that day. There was no evidence passengers did or did not see the officers' weapons or otherwise assume they were armed.

Inv. Hoover kneeled in the driver's seat of the bus, facing backwards to observe the passengers.[4] Inv. Hoover could see the passengers, and they could see him.

[3]Petitioner's Question Presented indicates there were only two officers, while its Statement correctly concedes there were three.

[4]At trial, Inv. Lang testified that Inv. Hoover stopped at the front of the bus and observed people from outside the bus.

Inv. Lang and Ofr. Blackburn went to the back of the bus and worked forward. Ofr. Blackburn checked the luggage of the passenger in the rear seat while Inv. Lang observed, and then Inv. Lang began working forward on the bus with Ofr. Blackburn assisting. After checking the rear passenger and the next two forward, Inv. Lang approached the Respondents' seats on the driver's side of the bus. Mr. Drayton was seated on the aisle and Mr. Brown by the window.

Inv. Lang testified that he stood beside Respondents, and Ofr. Blackburn was standing next to him. (The prosecutor described Inv. Lang as a "big" man.) There is a clearance of about 2-3 feet between the seated passengers' heads and the overhead luggage rack; the passenger in the window seat would have to duck his/her head to get out. Nevertheless, Inv. Lang opined he did not block the path to exit the seats. He did not have probable cause or a reasonable suspicion to search or arrest Respondents. The sole basis of his search was consent.

Inv. Lang leaned over the shoulder of Mr. Drayton to speak to Respondents. He held his badge up in his hand, with his face about 12-18 inches from Mr. Drayton's and a couple feet from Mr. Brown's. He agreed with the court's characterization that his style was "kind of 'in your face.'" Inv. Lang told Respondents:

> I'm Investigator Lang out of Tallahassee Police Department. We're conducting bus interdiction, make sure there's no weapons or drugs[5] on the bus. We would like for your cooperation. Do you have any luggage on the bus?

---

[5]Inv. Lang admitted at trial, consistent with his report, that he asked the men's permission to search only for weapons.

He never asked them, "Will you cooperate?" He either put his badge back in his pocket or let it fall on the chain once he explained who he was.

Inv. Lang asked the men if they had a carry-on bag. Mr. Brown pointed to the green bag above their head. Inv. Lang asked, "Do you mind if I check it?," and Mr. Brown responded, "Go ahead." Inv. Lang reached for the bag and handed it to Ofr. Blackburn, who searched it and found nothing illegal.

Inv. Lang turned his attention back to Mr. Drayton and Mr. Brown and noticed[6] that they were both wearing large jackets and baggy pants. He thought it kind of odd to be dressed like that, since it was somewhat warm. He acknowledged Mr. Drayton was bound for Indiana, "up where it's very cold." He also agreed it might get cold on the bus, particularly if the passenger is seated where air conditioning might be blowing., He agreed this might be a very good reason to have on a jacket, irrespective of outside temperature.[7]

Inv. Lang's attention was more on Mr. Brown because he was more communicative, while Mr. Drayton was "being real quiet." Inv. Lang asked Mr. Brown if he had any weapons or drugs on him and asked, "Do you mind if I check your person?," to which Mr. Brown replied, "Sure." Mr. Brown went into his pocket and pulled out a cell phone, and then held his coat open.

---

[6]At the suppression hearing, the court specifically asked Inv. Lang: "Did you have anybody targeted or anything like that?" Inv. Lang responded, "No sir. I just observed them because of what they were wearing, and the weather wasn't that cold in Tallahassee at the time." He said nothing about seeing them before they were on the bus. At trial, however, he testified that he first noticed them inside the terminal, during the stopover.

[7]At trial, he acknowledged that Mr. Drayton had to change buses in Tallahassee but was unsure if this was why he wore his coat off the arriving bus.

Inv. Lang, reaching across Mr. Drayton, checked Mr. Brown's jacket and pockets and then his waist area. He asked Mr. Brown to lean up for him and then checked him from behind. Then Inv. Lang frisked down the front of Mr. Brown's pants from the waistband to the tops of his thighs. On both thighs, he felt hard objects inconsistent with normal human anatomy.

Inv. Lang asked Mr. Brown to step into the aisle, where Inv. Lang handcuffed him. Inv. Hoover came from the front and removed Mr. Brown from the bus.

Inv. Lang then turned his attention back to Mr. Drayton and asked, "Mind if I check you?" Mr. Drayton did not answer but lifted his hands "maybe eight inches off his legs." Inv. Lang's frisk turned up the same thing, so Mr. Drayton was handcuffed and removed.

Post-arrest

In an adjacent parking lot, Inv. Lang unbuttoned the men's pants and discovered bundles of powder cocaine. Mr. Brown had 483 grams, and Mr. Drayton had 295 grams.

The Presentence Investigation Report (PSI) indicates that Mr. Drayton was a poor student who graduated high school with difficulty. At the station, Mr. Drayton repeatedly said he was going to sell the drugs in "downtown Indiana."

Inv. Lang did not get the names and addresses of any witnesses to this incident. He explained:

> On that bus people don't like giving out their name and don't like giving out information in reference to what they're doing. So I don't want to inconvenience them at that time.

Appeal

The court of appeals summarized the issue, and its conclusion, as follows:

> The only issue before this Court is, as we put it in *Washington*, 151 F.3d at 1355, whether the consent given by each defendant for the search was "uncoerced and legally voluntary" under the Fourth Amendment. Because the facts of this case are not distinguishable in a meaningful way from those in *Washington*, we are compelled by that decision to hold that these defendants' consent was not sufficiently free of coercion to serve as a valid basis for a search.

(App. to Pet. at 2a)

SUMMARY OF THE ARGUMENT

Petitioner, understandably upset over its loss below, overstates its case. It argues the court below has erected a *per se* rule, when in fact the court below has expressly and repeatedly declined to do so. Instead, the court below has carefully followed this Court's guidance in Florida v. Bostick and Schneckloth v. Bustamonte requiring consideration of all the factors - the totality of the circumstances - in determining the voluntariness of consent of a bus passenger.

Likewise, there is no conflict between the circuits, as the single decision cited by the government misperceived the position of the court below, and the court below declined to address that case.

The government also misstates and omits critical facts. This case is distinguished by the fact that the passengers were not subjected merely to searches of their luggage - they were also subjected to having their thighs and mid-sections frisked in public. This was an indignity to which *no one* traveling on public transportation - who was free to do otherwise - would likely consent. Further, the officers' admitted failure to await a response before initiating their frisks made clear that the passengers' consent or lack thereof was irrelevant.

ARGUMENT

Petitioner misstates both the facts and the ruling below. Contrary to its representations, the court of appeals did not erect a *per se* rule but expressly rejected such a rule, adhering to this court's totality of the circumstances test in determining the voluntariness of consent. Petitioner is simply unhappy at this late juncture that the facts it created were inadequate under the totality-of-the-circumstances test to prove a voluntary consent.

A. The Court of Appeals' Decision is Entirely Consistent With This Court's Precedent.

Petitioner claims that the decision below "represents a marked deviation from this Court's teachings." (Pet. at 11)[8] Its position is simply unfounded. Petitioner's argument centers on its claim that the court of appeals has erected a *per se* rule in contravention of Florida v. Bostick, 501 U.S. 429, 438, 111 S. Ct. 2382, 2388 (1991).

In Bostick, this Court rejected the Florida Supreme Court's *per se* prohibition against searches of bus passengers or their luggage. This Court concluded that the "accurate measure of the coercive effect of" the police-citizen encounter is "whether a reasonable person would feel free to decline the officer's requests or otherwise terminate the encounter." 501 U.S. at 436, 111 S. Ct. at 2387. "The crucial test is whether, taking into account all of the circumstances surrounding the encounter, the police conduct would 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his

[8]Petitioner claims the decision below "contravened 'a long, unbroken line of decisions'" allowing police officers to approach individuals "'and ask them potentially incriminating questions' without effectuating a seizure." (Pet. at 11) Petitioner argues the decision below "carve[d] out an exception for encounters that occur on a bus." Id.

business.'" 501 U.S. at 437, 111 S. Ct. at 2387, quoting Michigan v. Chestnut, 486 U.S. 567, 569, 108 S. Ct. 1975, 1977 (1988).

The totality of the circumstances test for consent searches was set out in Schneckloth v. Bustamonte, 412 U.S. 218, 93 S. Ct. 2041 (1973). It provides that the government bears the burden of proving that consent was voluntary, based on

> the totality of all the surrounding circumstances - both the characteristics of the accused and the details of the interrogation. . . . Factors taken into account have included the youth of the accused; his lack of education . . . or his low intelligence; the lack of any advice to the accused of his constitutional rights; the length of detention; the repeated and prolonged nature of the questioning; and the use of physical punishment such as the deprivation of food or sleep. . . . While the state of the accused's mind, and the failure of the police to advise the accused of his rights, [are] certainly factors to be evaluated in assessing the "voluntariness" of an accused's responses, they [are] not in and of themselves determinative.

412 U.S. at 226, 93 S. Ct. at 2047. Bostick then noted that two factors among others are relevant to searches on buses, i.e., whether the police told the passenger he had a right to refuse consent and the fact that the encounter takes place in a cramped environment. 501 U.S. at 432-37, 111 S. Ct. at 2385-87.

The court of appeals in no way erected a *per se* rule. It did not prohibit officers from approaching bus passengers, from questioning passengers, from asking permission to search passengers' luggage, or even from frisking passengers. All the court did was, in the context of this case, apply the precedent of this Court and conclude that the frisks of Respondents' mid-sections and thighs were not based on valid consent.[9]

---

[9]Petitioner also implies this is primarily a question of a valid seizure, as opposed to the argument and ruling below focusing on the issue of consent.

In fact, the court below has repeatedly "declined to adopt a rule requiring police officers to notify bus passengers of their right to refuse to consent to search of their belongings." United States v. Standberry, 204 F.3d 1123 (11th Cir. 1999) (unpublished decision) (App. A, *infra*, at 2),[10] citing United States v. Guapi, 144 F.3d 1393 (11th Cir. 1998) (rejecting "the notion of a *per se* rule requiring bus passengers to be informed of their constitutional rights"); United States v. Washington, 151 F.3d 1354 (11th Cir. 1998) (acknowledging that this Court "has steadfastly rejected the notion of imposing *per se* rules on police officers conducting warrantless searches" and examining the totality of the circumstances).[11]

If the court below had indeed erected a *per se* rule, as Petitioner argues, there would have been no need for this case or for other circuit precedent on this point to have discussed and weighed each of the relevant factors. Contrary to Petitioner's argument, the court of appeals has consistently followed this Court's totality-of-the-circumstances test. See Guapi, 144 F.3d at 1393-96; Washington, at 1355-57; United States v. Hill, 228 F.3d 414 (11th Cir. 2000) (unpublished decision) (App. B, *infra*); see also, App. to Pet. at 8a n. 6.

Similarly, there would be no cases in which the court below had affirmed the denial of the motion to suppress, a point the Petitioner omits. See, e.g., United States v. Smith, 201 F.3d 1317 (11th Cir. 2000) (unpublished decision) (App. C, *infra*); United States v. Fields,

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[10]The three unpublished decisions cited are in the Appendix.

[11]Much of Petitioner's grievance seems to be with the Washington decision, but it did not even seek this Court's review in that case.

909 F.2d 470 (11th Cir. 1990); United States v. Hammock, 860 F.2d 390 (11th Cir. 1988).[12]

Thus, there is no conflict between the decision below and this Court's precedent. Petitioner merely disagrees with the weighing of the factors by the court of appeals in this particular case.

B. There is No Conflict Among Circuits Concerning Bus Interdiction Programs.

Mere disagreement between circuits in individual factual scenarios as to the application of the various factors or the weight of a particular factor does not constitute the type of conflict requiring this Court's intervention or clarification.[13]

First, the government cites only one decision as disagreeing with the court below. United States v. Broomfield, 201 F.3d 1270, cert. denied, 531 U.S. 830 (2000). First, Broomfield recognized early and often that determining whether consent was voluntary required the "application of .. . [an] objective, fact specific test." 201 F.3d at 1274. The Tenth Circuit agreed that the Eleventh Circuit's decision in Guapi was correctly decided under the facts of that case. 201 F.3d at 1274. In so doing, the Tenth Circuit distinguished Guapi and Broomfield on their facts. 201 F.3d at 1274. However, the Tenth Circuit believed that the dispositive factor in the Eleventh Circuit's Washington decision was the police officer's failure to tell the bus passenger of the right to refuse consent. 201 F.3d at 1275.

[12]As this Court expressly suggested in Bostick, the presence or absence of advice as to the passengers' right to refuse consent was only one factor weighed in these cases.

[13]Compare, United States v. Arvizu, 121 S. Ct. 2214 (2001) (granting certiorari to consider decision of court of appeals departing from totality-of-the-circumstances test, in Border Patrol vehicle stop and search case, by holding that seven factors had no weight and could not be considered as a matter of law).

Thus, because this one factor among many considered in Washington seemed to be dispositive, Broomfield confused it with being a *per se* rule. However, Washington made it crystal clear that this was only one of many factors it considered and disavowed any *per se* rule.[14]

Interestingly, when the losing defendant in both Broomfield and an earlier Tenth Circuit case, United States v. Hill, 199 F.3d 1143 (1999), cert. denied, 531 U.S. 830 (2000), sought review in this Court, the government told this Court in both cases there was no conflict between the courts of appeal on this point. (Pet. at 19-20 n. 1) The government argued then that "the cases were factually distinguishable in several respects," but now attempts to argue credibly that the decision below "eliminated any basis for meaningfully distinguishing Broomfield." (Pet. at 19-20 n. 1) Again, however, mere disagreement on the weight to be accorded one factor in one case, and not even the present case, is no basis for this Court's certiorari jurisdiction.

In truth, the only thing distinguishing this case is that the government lost here, so now it suddenly sees conflict between the circuits. Certainly, its only attempt to explain its sudden change in position, on the basis that this case involves a "one-on-one encounter," is without factual support in the record. Bloomfield involved only one officer on the bus, while this case involved three, all three of whom were directly involved with the Respondents at some point. That this case involves police officers immediately approaching passengers individually, instead of first making a general announcement, is a thin distinction and only

[14]While the dissent in Washington disagreed with the majority opinion, the law of the Eleventh Circuit is the majority opinion. Interestingly, not one judge from the Eleventh Circuit dissented from the denial of Petitioner's petition for rehearing en banc in this case.

one of a number of factors relevant to the issue. In taking this route, Petitioner falls prey to the same ill of which it falsely accuses the court of appeals, i.e., it focuses on only one of the many factors relevant to the totality of the circumstances test set out by this Court.

Second, the fact that one circuit may "criticize" another's resolution of a matter is not a compelling reason for the exercise of this Court's jurisdiction. Sup. Ct. R. 10(a).

Third, the decision of the Ninth Circuit, United States v. Stephens, 206 F.3d 914 (9th Cir. 2000) (Pet. at 20-21), was simply another bus search case involving application of the various facts to the circumstances of that case. It did not even involve the question of consent, as did the present case, but solely the question of whether the passenger had been seized. Petitioner relies primarily on the dissent by one judge to bolster its argument here. However, rehearing en banc was denied in Stephens, and Petitioner did not even seek this Court's review.

In sum, the Tenth Circuit did not reach a "diametrically opposed position" to that of the Eleventh Circuit. (Pet. at 17) It merely disagreed with the application of this Court's precedent to different factual scenarios. As such, there is no conflict between the circuits beyond the mere application of the same test to different facts.

C. This Court Has Given Clear Guidance in this Area.

This Court has amply clarified this area of the law, and the courts of appeal have given no indication they are confused or need further clarification.[15] Petitioner's final plea for intervention based on the "current environment" is a transparent play on emotion to

[15]The government argues that this issue has arisen repeatedly, citing only Eleventh Circuit cases. (Pet. at 22 n. 2) Perhaps the decision below was published precisely because it appeared that state law enforcement agents needed additional guidance.

rescue the lost conviction in this case. However, the Constitution did not change on September 11, 2001. Perhaps more than ever, the primacy of the Constitution and the relationship it creates between government and citizens must be honored.

The decision below, which merely required compliance with the Constitution and precedent of this Court, was a sound application of well-established law to the individual facts of this case. Nothing in our recent national tragedies changed that or impels this Court's reversal of the court of appeals.

CONCLUSION

Because there is no conflict between the decision below and precedent of this Court, or between the circuits on this issue, Petitioner complains merely of the court of appeals' weighing of individual facts in this case. Therefore, the petition for writ of certiorari should be denied.

Respectfully submitted,

GWENDOLYN SPIVEY
Attorney for Respondent Drayton

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
DEC 15 1999
THOMAS K. KAHN
CLERK

No. 99-11624
Non-Argument Calendar

D. C. Docket No. 99-00003-4-CR-RH

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CHARLES D. STANDBERRY,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Florida

(December 15, 1999)

Before TJOFLAT, BLACK, and BARKETT, Circuit Judges.

PER CURIAM:

Appellant Charles D. Standberry appeals his conviction and sentence for possession with intent to distribute cocaine base, in violation of 21 U.S.C. § 841. Appellant was a passenger on a Greyhound bus late for its departure from the Tallahassee, Florida, station. Officers from the Tallahassee Police Department boarded the bus and obtained consent to search the baggage of a number of passengers, including Appellant. Appellant's bag contained a package of about 500 grams of cocaine base. Appellant moved to suppress the cocaine on the ground that his consent to the search was not voluntarily given under this Court's bus search decision in *United States v. Washington*, 151 F.3d 1354 (11th Cir. 1998). The district court distinguished the facts of *Washington* and denied the motion. Appellant then pled guilty, was sentenced to 262 months' imprisonment and 5 years' supervised release, and timely appealed. We agree with Appellant that his case is not sufficiently distinguishable from *Washington*, so the police officers' search must be invalidated under that precedent. We therefore vacate Appellant's conviction and sentence and remand to the district court.

This Court has declined to adopt a rule requiring police officers to notify bus passengers of their right to refuse to consent to search of their belongings. *See Washington*, 151 F.3d at 1355; *United States v. Guapi*, 144 F.3d 1393, 1393, 1395 (11th Cir. 1998). Were such notice given in this case, we easily could have

concluded that Appellant's consent to the search was voluntary. When a notice of the right to refuse consent is not given, however, this Court examines the totality of the circumstances to determine whether the consent was voluntary, evaluating whether a reasonable person in the defendant's situation would understand that consent may be refused or would believe that cooperation with law enforcement is required without the possibility for objection. *See Washington*, 151 F.3d at 1355, 1357; *Guapi*, 144 F.3d at 1393, 1395-97. As in *Washington*, which invalidated the challenged bus search, the police officers in this case did not notify Appellant of his right to refuse consent to the search. We therefore must determine whether this case is sufficiently factually distinguishable from *Washington* so that the validity of search may be sustained.

Most of the facts of the bus search in this case are indistinguishable from *Washington*. *Cf.* 151 F.3d at 1355-56. The officers—including Officer Lang, the officer who actually performed the searches—boarded the bus prior to its departure. The officers were plain-clothed, not uniformed (although Lang wore his badge hanging from his neck), and their weapons were concealed from view. Lang began in the back of the bus and proceeded forward. Lang did not block the aisle or otherwise impede egress from the bus. Lang searched at least three other persons before Appellant. No one, including Appellant, was told that they were under arrest

or under investigation, and there was no physical contact between Lang and Appellant. As noted, Lang did not verbally inform anyone that they had a right to refuse consent to the requested search of their bags.

Several facts in this case are distinguishable from *Washington* in the Government's favor. First, there was no general announcement made from the front of the bus that a police search of all passengers was being conducted. Instead, Lang approached persons individually and asked their consent to search one-on-one. Second, the district court made particular emphasis of the fact that it credited Lang's manner and disposition as polite, calm, and not intimidating. Third, Lang did not ask passengers to produce tickets or identification. The district court concluded that these facts distinguished this case from *Washington* because they removed any indication that the officer was giving instructions with which compliance was required rather than requesting consent that could be refused.

On the other hand, several facts in this case are distinguishable from *Washington* in Appellant's favor. Three officers boarded the bus, not two officers as in *Guapi* and *Washington*. After they boarded the bus, two officers moved to the rear; the other apparently remained there while Lang proceeded up the aisle toward the front. The third officer stayed in the driver's seat, facing backward toward the passengers. In this case, therefore, as in *Guapi* and *Washington*, only one officer

actually approached persons to ask for consent to a search. Like *Guapi* and unlike *Washington*, however, there was an officer stationed at the front of the bus. The presence of an officer at the exit, even if not so intended, is an implication to passengers that the searches are mandatory. *See Washington*, 151 F.3d at 1355, 1357; *id.* at 1358 (emphasizing absence of officer at front of bus); *Guapi*, 144 F.3d at 1394, 1396.

Our evaluation of all of these facts leads to the conclusion that this case is controlled by *Washington*. Although several facts support the Government's contention that the facts of this case would be perceived by the reasonable passenger as less coercive than *Washington*, we agree with Appellant that several other facts—particularly the presence of one of the officers at the front of the bus throughout the bus searches—tip the analysis back to a level at least even with the facts of *Washington* in their coerciveness to a reasonable passenger. Thus, in the aggregate, the facts distinguishable from *Washington* cancel out each other by comparison to the baseline—that facts of *Washington* were an invalid search.

The district court should have granted Appellant's motion to suppress the cocaine base discovered in the bus search, which is invalid under *Washington*. Accordingly, we vacate Appellant's conviction and sentence and remand for further proceedings consistent with this opinion.

VACATED AND REMANDED.

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-12662

D. C. Docket No. 99-00012-CR-4-RH

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
JUL 24 2000
THOMAS K. KAHN
CLERK

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WILLIAM LAMONT HILL,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of florida

(July 24, 2000)

Before ANDERSON, Chief Judge, DUBINA and HILL, Circuit Judges.

PER CURIAM:

Appellant William Lamont Hill appeals his conviction and sentence for possession with intent to distribute cocaine base, in violation of 21 U.S.C. § 841, and conspiracy to possess with intent to distribute cocaine base, in violation of 21 U.S.C. § 846. Appellant was a passenger on a Greyhound bus departing from the Tallahassee, Florida, station. Officers from the Tallahassee Police Department boarded the bus and obtained consent to search Appellant's bag, which contained a package of about 333 grams of cocaine base. Appellant moved to suppress the cocaine on the ground that his consent to the search was not voluntarily given under this Court's bus search decision in *United States v. Washington*, 151 F.3d 1354 (11th Cir. 1998). The district court distinguished the facts of *Washington* and denied the motion in an oral ruling. *See* R. 1-42 at 106-117. Appellant was convicted by a jury, was sentenced to life imprisonment, and timely appealed. We agree with Appellant that his case is not sufficiently distinguishable from *Washington*, so the police officers' search must be invalidated under that precedent. We therefore vacate Appellant's conviction and sentence and remand to the district court.

This Court has declined to adopt a rule requiring police officers to notify bus passengers of their right to refuse to consent to search of their belongings. *See Washington*, 151 F.3d at 1355; *United States v. Guapi*, 144 F.3d 1393, 1393, 1395 (11th Cir. 1998). Were such notice given in this case, we easily could have concluded

that Appellant's consent to the search was voluntary. When a notice of the right to refuse consent is not given, however, this Court examines the totality of the circumstances to determine whether the consent was voluntary, evaluating whether a reasonable person in Appellant's situation would understand that consent may be refused or would believe that cooperation with law enforcement is required without the possibility for objection. *See Washington*, 151 F.3d at 1355, 1357; *Guapi*, 144 F.3d at 1393, 1395-97. As in *Washington*, which invalidated the challenged bus search, the police officers in this case did not notify Appellant of his right to refuse consent to the search. We therefore must determine whether this case is sufficiently factually distinguishable from *Washington* so that the validity of search may be sustained.

Most of the facts of the bus search in this case are indistinguishable from *Washington*. *Cf.* 151 F.3d at 1355-56. The officers—including Officer Lang, the officer who actually requested Appellant's consent and searched the bag—boarded the bus prior to its departure. The officers were plain-clothed, not uniformed, although Lang displayed his badge while requesting Appellant's consent. Lang began in the very back of the bus, where Appellant was sitting; Lang approached Appellant after first examining the back of the bus and the restroom. Lang did not block the aisle or otherwise impede egress from the bus. No one, including Appellant, was told that they were under arrest or under investigation, and there was no physical contact between

Lang and Appellant. As noted, Lang did not verbally inform Appellant that he had a right to refuse consent to the requested search of his bag.

Several facts in this case are distinguishable from *Washington* in the Government's favor. First, there was no general announcement made from the front of the bus that a police search of all passengers was being conducted. Instead, Lang approached Appellant individually and asked his consent to search one-on-one. Second, Lang did not ask Appellant to produce tickets or identification. Third, the district court noted that it credited Lang's manner and disposition as not overbearing. The district court concluded that these facts distinguished this case from *Washington* because they removed any indication that the officer was giving instructions with which compliance was required rather than requesting consent that could be refused.

On the other hand, several facts in this case are distinguishable from *Washington* in Appellant's favor. Three officers boarded the bus, not two officers as in *Guapi* and *Washington*. After they boarded the bus, two officers moved to the rear. The third officer stayed in the driver's seat, facing backward toward the passengers; although partially obscured by plexiglass, his presence was visible to Appellant and the other passengers. In this case, therefore, as in *Guapi* and *Washington*, only one officer actually approached Appellant to ask for consent to a search (though the second officer was also nearby in the back of the bus). Like *Guapi* and unlike *Washington*, however,

there was an officer stationed at the front of the bus. The presence of an officer at the exit, even if not so intended, is an implication to passengers that the searches are mandatory. *See Washington*, 151 F.3d at 1355, 1357; *id.* at 1358 (Black, J., dissenting) (emphasizing absence of officer at front of bus); *Guapi*, 144 F.3d at 1394, 1396.

Our evaluation of all of these facts leads to the conclusion that this case is controlled by *Washington*. Although several facts support the Government's contention that the facts of this case would be perceived by the reasonable passenger as less coercive than *Washington*, we agree with Appellant that several other facts—particularly the presence of one of the officers at the front of the bus throughout the bus search—tip the analysis back to a level at least even with the facts of *Washington* in their coerciveness to a reasonable passenger. Thus, in the aggregate, the facts distinguishable from *Washington* cancel out each other by comparison to the baseline—that the facts of *Washington* were an invalid search.

The district court should have granted Appellant's motion to suppress the

cocaine base discovered in the bus search, which was invalid under *Washington*. Accordingly, we vacate Appellant's conviction and sentence and remand for further proceedings consistent with this opinion.[1]

VACATED AND REMANDED.

[1] We need not address Appellant's other arguments on appeal—that the prosecution's strike of one potential juror was a *Batson* violation, and that the prosecution made an improper comment during closing argument—because Appellant's conviction is vacated on the Fourth Amendment suppression issue.

APPENDIX C

PUBLISH

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
01/27/2000
THOMAS K. KAHN
CLERK

No. 98-2100

D. C. Docket No. 97-00120-CR-J-21B

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RUVEL ALFRED SMITH, JR., a.k.a. Rube Smith, etc.,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(January 27, 2000)

Before EDMONDSON and MARCUS, Circuit Judges, and STROM*, Senior District Judge.

* Honorable Lyle E. Strom, Senior U.S. District Judge for the District of Nebraska, sitting by designation.

EDMONDSON, Circuit Judge:

Defendant, Ruvel Alfred Smith, Jr., appeals his convictions for conspiring to distribute cocaine and possessing cocaine with intent to distribute, in violation of 21 U.S.C. §§ 841 and 846. Defendant asserts that the district court erred in denying Defendant's motion to suppress. We affirm.

BACKGROUND

This case arises from a bus check at a Jacksonville, Florida, bus station. On 5 May 1997, DEA Special Agent Bruce Savell and Border Patrol Agent James Perkins were conducting narcotics-interdiction surveillance at the bus station. Savell, inside the bus terminal, noticed Defendant's co-indictee, Joseph Tee Bruton. According to Savell, Bruton constantly changed seats, walked around, and scanned the terminal. Bruton watched every passenger who walked through the terminal. Bruton appeared nervous. Savell also noticed two new, hard-sided, suitcases sitting unattended in the terminal. The suitcases appeared to be expensive. Savell observed Bruton and the suitcases for approximately forty minutes.

At some point, Bruton met with Defendant inside the terminal. The two men engaged in a quick, whispered conversation. Defendant and Bruton then turned away from each other and walked in opposite directions. After this exchange, Savell began to observe Defendant. Savell noted that Defendant also walked around the terminal, switched seats, and went in and out of the terminal.

Soon thereafter, Bruton sat down with the previously unattended suitcases between his legs. A boarding announcement was made for a northbound bus, and Bruton picked up the suitcases and walked toward the boarding gate. As he approached the gate, Bruton slid one suitcase across the terminal floor to Defendant. Bruton and Defendant each carried one suitcase through the gate.

Agent Savell waited for about four minutes and then went through the boarding gate. Savell saw the two suitcases in the undercarriage of the bus. He checked the baggage tags attached to the suitcases; the tags revealed that the suitcases belonged to a "Mr. Pender" and had originated in Miami, Florida.

At that point, based on his training and experience,[1] Savell suspected that Defendant and Bruton were carrying drugs in the suitcases.[2] Savell requested and

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[1] At the time of this incident, Savell had been a DEA agent for six years. During those six years, Savell had conducted surveillance and searches at bus stations on hundreds of occasions.

[2] Savell testified that his suspicion was based on several considerations, including Bruton's scanning the terminal and other bus passengers, Defendant and Bruton's nervous behavior, their whispered conversation, and their leaving the suitcases unattended for more than half an hour in the

obtained the bus driver's permission to board the bus and to conduct a bus check. Savell and Perkins, although dressed in plainclothes, displayed their badges as they boarded the bus. The agents' firearms were concealed. Perkins announced to the passengers:

> Good morning, ladies and gentlemen, my partner and I are both federal agents of the United States Department of Justice. Nobody is under arrest or anything like that, we're just conducting a routine public transportation safety check. When we get to you, if you would please show us your bus ticket, some photo identification, if you have some with you, please. And, most importantly, if you would identify which bags are yours on the bus, we'd appreciate it, and we'll be out of your way real quick.

Neither Savell nor Perkins expressly informed the passengers that their cooperation was voluntary. The agents then, beginning in the back of the bus and making their way forward, spoke individually with each passenger. The agents, in addition to inspecting each passenger's ticket and identification, asked each passenger whether the passenger was carrying weapons, drugs, or large amounts of money. The agents stood behind each passenger and did not block the aisle of (or exit from) the bus as they conducted their bus check. The check of passengers failed to reveal a "Mr. Pender" aboard the bus.

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terminal. Savell testified that, in his experience conducting drug-interdiction at the bus station, drug couriers frequently leave their narcotics-laden luggage unattended until immediately before boarding.

When approached by the agents, Defendant offered a one-way ticket from Miami to Charleston, South Carolina, and a driver's license for the agents' inspection. Bruton also displayed a ticket from Miami to Charleston; Bruton said that he was carrying no identification. Defendant and Bruton each denied that he was carrying drugs or weapons, that he had checked luggage, and that he was traveling with anyone. Defendant and Bruton permitted the agents to search their carry-on luggage. The agents frisked Defendant and Bruton, but they found no weapons.

After the agents completed their survey of the passengers, Savell retrieved the two pertinent suitcases from the undercarriage and brought them aboard the bus. Savell asked whether a passenger claimed ownership of the suitcases. No passenger claimed to own the suitcases. Savell then directly asked Defendant and Bruton, individually, whether they owned the suitcases. Both Defendant and Bruton denied ownership of the suitcases.

Savell and Perkins, assisted by two Florida Highway Patrolmen, then opened the suitcases. The agents discovered eleven kilograms of cocaine in the suitcases. Defendant and Bruton were arrested.[3] After making the arrests, the

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[3] Bruton pled guilty and later testified against Defendant at trial.

agents discovered a bus ticket in the name of "Pender" concealed in a seat near Defendant and Bruton.

Defendant moved the district court to suppress certain evidence, including the cocaine found in the suitcases, the Pender ticket, and various statements made by Defendant. Defendant argued that the discovery of all of this evidence flowed from the agents' check of bus passengers. Defendant asserted that the bus check was an unlawful seizure of the bus passengers in violation of the Fourth Amendment. Thus, Defendant contended, the evidence should be suppressed as "fruits of the poisonous tree." The district court disagreed, however, concluding that the bus check did not amount to a "seizure." The district court accordingly denied Defendant's motion to suppress. Defendant was tried by jury and convicted. Defendant appeals.

DISCUSSION

Defendant contends that the district court erred in denying his motion to suppress because: (1) the bus check was a "seizure" within the meaning of the Fourth Amendment; (2) the seizure was not reasonable and violated the Fourth Amendment; and (3) the fruits of the seizure, therefore, must be

suppressed. We accept Defendant's first contention: Circuit precedent mandates the conclusion that the bus check was a "seizure." We, however, conclude that the agents' seizure of Defendant aboard the bus was reasonable under the Fourth Amendment.[4] The district court, therefore, did not err in denying Defendant's motion to suppress.

1. WHETHER THE BUS CHECK WAS A "SEIZURE"

A well-established principle of Fourth Amendment jurisprudence is that a seizure does not occur just because a police officer approaches a person and asks the person a few questions. Florida v. Royer, 103 S. Ct. 1319, 1324 (1983). The Supreme Court, accordingly, has said that a bus check, where government agents board a bus and ask questions of the passengers, is not necessarily a seizure. Florida v. Bostick, 111 S. Ct. 2382, 2387-88 (1991). Instead, "the crucial test is whether, taking into account all of the circumstances surrounding the encounter, the police conduct would 'have communicated to a reasonable person that he was

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[4] Because we conclude that the bus check was reasonable under the Fourth Amendment, we need not consider the Government's alternative contention that, even if the bus check was an unreasonable seizure, the fruits of the bus check are nonetheless admissible under the inevitable discovery doctrine. See generally, Nix v. Williams, 104 S. Ct. 2501, 2509 (1984) (adopting inevitable discovery exception to exclusionary rule).

not at liberty to ignore the police presence and go about his business.'" Id. at 2387.

In United States v. Washington, 151 F.3d 1354 (11th Cir. 1998), this court considered the propriety of a bus check conducted in a manner nearly identical to the bus check in this case (and, involving the same officers). In that case, the two officers, casually dressed and with their weapons concealed, boarded a bus at the Jacksonville bus station. The officers displayed their badges and announced:

> Good morning, ladies and gentlemen. My partner and I are both federal agents with the United States Department of Justice. No one is under arrest or anything like that, we're just conducting a routine bus check. When we get to you, if we could please see your bus ticket, some photo identification if you have some with you, please, and if you would please identify which bag[] is yours on the bus we'd appreciate it and we'll be out of your way just as quick as we can.

Id. at 1355. The officers went to the rear of the bus and began working their way forward, speaking individually with each passenger and asking them if they were carrying "drugs, weapons, large sums of money, or firearms." Id. The officers stood behind each passenger as they spoke and did not block the passenger's access to the aisle of the bus. Neither officer told the passengers that their cooperation was voluntary. Id. at 1355-56. The court decided that, under those particular circumstances, the bus check constituted a "seizure." Id. at 1357.

We see no important distinction between the conduct of the bus check in this case and the conduct of the bus check in Washington. "[I]t is the firmly established rule of this Circuit that each succeeding panel is bound by the holding of the first panel to address an issue of law, unless and until that holding is overruled en banc, or by the Supreme Court." United States v. Hogan, 986 F.2d 1364, 1369 (11th Cir. 1993). Given the virtual identity of the essential facts, we, therefore, are bound by the Washington court's decision on the question of seizure.[5] Overcome by precedent, we must conclude that the bus check in this case amounted to a "seizure" within the meaning of the Fourth Amendment.

2. WHETHER THE SEIZURE VIOLATED THE FOURTH AMENDMENT

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[5] That Washington controls our determination that this bus check is a seizure does not mean that every bus check in this Circuit is a seizure. As the Supreme Court has acknowledged, whether a bus check constitutes a seizure is a very fact-sensitive inquiry; for this very reason, the Supreme Court has rejected per se rules governing bus checks. Bostick, 111 S. Ct. at 2389. But, because we find the facts of legal significance in this case identical to those in Washington, we conclude that Washington controls the seizure issue in this case. See generally, New Port Largo, Inc. v. Monroe County, 985 F.2d 1488, 1500 n.7 (11th Cir. 1993) (Edmondson, J., specially concurring) (discussing precedential value of prior panel decisions).

Our conclusion that this bus check constitutes a seizure does not end our inquiry, however.[6] Instead, we must now examine whether the seizure was reasonable under the Fourth Amendment.[7] The temporary, investigative detention of a person is constitutionally permissible if there exists, at the time of the detention, a reasonable suspicion that the person detained has been, is, or is about to be involved in criminal activity.[8] United States v. Blackman, 66 F.3d 1572, 1576 (11th Cir. 1995). Because we conclude that such a reasonable suspicion existed, at the time of the bus check, the district court did not err in denying Defendant's motion to suppress.

[6] "The Fourth Amendment is not, of course, a guarantee against all searches and seizures, but only against unreasonable searches and seizures." United States v. Sharpe, 105 S. Ct. 1568, 1573 (1985) (emphasis in original).

[7] Although Washington resolves the question of whether this bus check was a "seizure," it is wholly inapposite to the second step of our inquiry: given that a seizure occurred, whether the seizure was a reasonable one under the Fourth Amendment. In Washington, it does not appear that the Government contended that (or that the court addressed whether), even if the bus check was a seizure, the seizure was nonetheless reasonable: that is, the seizure was properly based upon the officers' reasonable suspicion or probable cause. See Washington, 151 F.3d at 1357. In this case, the Government, however, vigorously asserts that, even if the bus check was a seizure, it was a constitutionally valid seizure.

[8] In general, a seizure is constitutionally infirm unless the seizing officer has probable cause. Lindsey v. Storey, 936 F.2d 554, 558 (11th Cir. 1991). Where, however, the seizure is brief and minimally intrusive--a temporary, investigative detention--the seizing officer only need have "a reasonable articulable suspicion based on objective facts that the person has engaged in criminal activity." United States v. Blackman, 66 F.3d 1572, 1576 (11th Cir. 1995). Given the minimal degree of intrusiveness involved in the bus check in this case, we treat the bus check as a temporary, investigative detention, requiring only a reasonable suspicion. See id. at 1576-77.

Although reasonable suspicion "requires more than a hunch," id., "the requisite level of suspicion to make an investigative stop is 'considerably less than proof of wrongdoing by a preponderance of the evidence.'" United States v. Glover, 957 F.2d 1004, 1009 (2d Cir. 1992) (quoting United States v. Villegas, 928 F.2d 512, 516 (2d Cir. 1991)). In deciding whether the detaining officers had reasonable suspicion, we look at the totality of the circumstances known to the detaining officers at the time of the detention. United States v. Mikell, 102 F.3d 470, 475 (11th Cir. 1996); United States v. Cruz, 909 F.2d 422, 424 (11th Cir. 1989). And, we view the totality of the circumstances in the light of the officers' special training and experience. United States v. Brignoni-Ponce, 95 S. Ct. 2574, 2582 (1975); see also United States v. Cortez, 101 S. Ct. 690, 695 (1981); United States v. Bowles, 625 F.2d 526, 533-34 (5th Cir. 1980). We also bear in mind that behavior, seemingly innocuous to the ordinary citizen, may "appear suspect to one familiar with the practices of narcotics couriers." Glover, 957 F.2d at 1010; see also United States v. Mendenhall, 100 S. Ct. 1870, 1882 (1980) (Powell, J., concurring); United States v. Gonzalez, 969 F.2d 999, 1004 (11th Cir. 1992).

In this case, given Agent Savell's training and experience, we conclude that the totality of the circumstances created a reasonable suspicion that Defendant and Bruton were engaged in criminal activity. Defendant and Bruton both appeared

nervous in the bus terminal. See United States v. Cruz-Hernandez, 62 F.3d 1353, 1356 n.2 (11th Cir. 1995) (considering suspect's nervousness as factor contributing to reasonable suspicion). Defendant and Bruton's whispered conversation in the bus terminal and their joint transportation of the suitcases made apparent that they were traveling together; yet, they waited separately in the bus terminal, before the boarding call, apparently attempting to conceal their association. See Bowles, 625 F.2d at 534-35 (considering suspects' "efforts to hide association" in airport terminal as factor contributing to reasonable suspicion). Defendant and Bruton left their new, expensive suitcases unattended until immediately before boarding; Agent Savell testified that this is a common practice among drug couriers. See Brignoni-Ponce, 95 S. Ct. at 2582 ("In all situations, the officer is entitled to assess the facts in light of his experience in detecting [narcotics trafficking]."). The suitcases originated in Miami, a known "source city" for narcotics on the East Coast. See Bowles, 625 F.2d at 534 (finding fact that suspect was traveling from known drug source city "not an insignificant factor"). And, Bruton scanned and surveilled the terminal, watching every person who passed by him in the bus station. See Mendenhall, 100 S. Ct. at 1882 (Powell, J., concurring) (noting as factor in reasonable suspicion analysis that suspect "scanned the entire gate area"); see also United States v. Puglisi, 723

F.2d 779, 789 (11th Cir. 1984); Bowles, 625 F.2d at 535; United States v. Barnard, 553 F.2d 389, 391-92 (5th Cir. 1977).

We conclude that, at the time of the bus check, ample facts existed to give rise to a reasonable suspicion that Defendant and Bruton were involved in criminal activity. The temporary, investigative detention of Defendant aboard the bus, consequently, was reasonable under the Fourth Amendment. The district court, therefore, properly denied Defendant's motion to suppress. Defendant's convictions and sentence are AFFIRMED.

AFFIRMED.

Supreme Court, U.S.
FILED
NOV 28 2001

(3)

No. 01-631

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

CHRISTOPHER DRAYTON AND CLIFTON BROWN, JR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

THEODORE B. OLSON
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12pp

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In the Supreme Court of the United States

No. 01-631

UNITED STATES OF AMERICA, PETITIONER

v.

CHRISTOPHER DRAYTON AND CLIFTON BROWN, JR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

1. Respondents principally contend that the judgment in this case does not warrant this Court's review because any difference in outcomes in the courts of appeals results not from a disagreement over the Fourth Amendment standards that govern police-citizen encounters on buses, but from the individual facts and circumstances of each case. Br. in Opp. 14. Analysis of the cases, however, establishes that there is a circuit conflict on a matter of legal principle, *i.e.*, what is necessary for a police-citizen encounter on a means of public transportation to remain consensual. That conflict on an important police practice warrants this Court's review.

a. The court of appeals held that respondents had been illegally seized, and that their consent to search was therefore involuntary, even though the officers

that approached respondents spoke in a quiet voice, did not reveal their weapons or make any intimidating movements, left the aisle of the bus unencumbered so that respondents could exit, and said nothing to suggest that respondents could not leave the bus or were required to cooperate. Pet. App. 3a-4a. The court of appeals did not dispute the district court's conclusions that "everything that took place between Officer Lang and Mr. Drayton and Mr. Brown suggests that [the encounter] was cooperative," that "[t]here was nothing coercive," and that "there was nothing confrontational about" the interaction. *Id.* at 13a. The court of appeals nevertheless refused to hold the police encounter consensual "without some positive indication that consent" or cooperation "could have been refused." *Id.* at 6a (quoting *United States* v. *Washington*, 151 F.3d 1354, 1357 (11th Cir. 1998)).

The facts of this case do not differ in relevant respects from those of *United States* v. *Flowers*, 912 F.2d 707 (4th Cir. 1990), cert. denied, 501 U.S. 1253 (1991), and *United States* v. *Broomfield*, 201 F.3d 1270 (10th Cir.), cert. denied, 531 U.S. 830 (2000), in which other courts of appeals examining encounters on buses found both that there was no seizure and that the passengers' consent was voluntary. See Pet. 18-21. In *Flowers*, as here, multiple officers boarded a bus to interdict guns and drugs. 912 F.2d at 711. In *Flowers*, as here, the officers spoke to the bus passenger "in a casual tone of voice," did "not block the aisle," and did not "display[] weapons or restrain[] [the passenger] in any way." *Ibid.* And in *Flowers*, as here, no warning of the right to refuse consent was given. The Fourth Circuit in *Flowers* concluded that "[t]he officers did not seize [the defendant] merely by engaging him in conversation. * * * Nothing about the officers' conduct * * * impaired [the passenger's] right to refuse to talk to them or to leave the bus." *Id.* at 709. See also Pet. 21. In contrast, here the Eleventh Circuit held that a seizure had occurred and that the officers had violated respondents' Fourth Amendment rights on virtually identical facts.

Respondents make no attempt to distinguish *Flowers*. They do not identify any relevant fact or circumstance that might explain the disparate results. Nor could any persuasive explanation be offered: the only difference between this case and *Flowers* is the circuit in which each case arose.

The decision below also conflicts with the Tenth Circuit's decision in *Broomfield*. See Pet. 18-19. Respondents do not dispute that, in *Broomfield*, the Tenth Circuit held that the bus passenger's consent was voluntary where the officer, like the officers here, "displayed his badge," "spoke * * * in an even tone [,] * * * and made no coercive or threatening gestures or comments," even though the officer "did not inform [the defendant] of his right to refuse consent." 201 F.3d at 1275. Nor do respondents dispute that *Broomfield* "declined to follow" the Eleventh Circuit's decision in *United States* v. *Washington*, 151 F.3d 1354 (1998)—the decision deemed "controll[ing]" of this case, see Pet. App. 5a—because the Tenth Circuit concluded that *Washington* effectively "creat[ed] a per se rule that authorities must notify bus passengers of the right to refuse consent before questioning those passengers and asking for consent." 201 F.3d at 1275; see Pet. App. 2a n.2.

Instead, respondents note (Br. in Opp. 15) that the United States, in opposing the petition for a writ of certiorari in *Broomfield*, distinguished that case from *Washington*. *Broomfield*, the government noted, in-

volved an officer who approached passengers individually in a non-confrontational manner; in contrast, in *Washington* the officer made an announcement at the front of the bus that the court of appeals thought potentially coercive. See Pet. 19-20 n.1. Although respondents criticize that distinction as "thin," Br. in Opp. 16, it was well supported by the Eleventh Circuit case law that existed before this decision. As the court of appeals explained in this case, an earlier precedent, *United States* v. *Guapi*, 144 F.3d 1393 (11th Cir. 1998), relied precisely on that distinction. "[W]hen officers individually approach passengers and communicate an intention to conduct a search, instead of making a general announcement," *Guapi* stated, "there is 'no reason to believe . . . that they are coercing or intimidating citizens.'" Pet. App. 7a n.5 (quoting *Guapi*, 144 F.3d at 1396).

In this case, however, the court of appeals dismissed that distinction as dictum, and held that an officer renders an encounter on a bus "coercive" even if he makes no general announcement at the front of the bus and instead engages each passenger in polite conversation on an individual basis. Pet. App. 7a. As a result, there remains no persuasive distinction between this case on the one hand and *Flowers* and *Broomfield* on the other.[1] Equally significant, there is no advice that

[1] Respondents also point out that, in *Broomfield*, the officer entered the bus alone, while in this case there were three officers on the bus. Br. in Opp. 16. Even if that were a persuasive distinction, it does not distinguish *Flowers*; there too multiple officers entered the bus. The distinction's relevance is also highly questionable. While an overwhelming number of officers might under some circumstances contribute to a coercive atmosphere, there is no evidence here that the presence of three officers on a 40-passenger bus created coercion. See Pet. 14 (discussing *INS* v. *Delgado*, 466 U.S. 210 (1984), in which multiple officers conducted "factory sweeps" and this Court found no Fourth Amendment seizure). In any event, prohibiting more than one officer from entering a bus at a time would raise significant officer safety concerns in some locations. As the court of appeals noted (Pet. App. 3a, 7a), in this case it was precisely to ensure officer safety that an additional officer was stationed at the front, where he could observe the passengers.

the government can offer law enforcement officers on how to prevent citizen-police encounters on a bus from being transformed into seizures, and consent from being rendered involuntary, other than through the provision of express *Miranda*-like warnings of the right to leave and to refuse consent. That requirement, uniquely in effect in the Eleventh Circuit and rejected by two other circuits, creates a conflict that justifies this Court's intervention.

b. Respondents err in suggesting that the United States has sought review here simply because the decision below was adverse. Br. in Opp. 11, 16. Following the Eleventh Circuit's decision in *Washington* and the Tenth Circuit's decision in *Broomfield*, the United States repeatedly decided not to seek review of adverse court of appeals decisions which, like the decision below, required the suppression of evidence obtained from bus passengers during consent searches. See, *e.g.*, *United States* v. *Stephens*, 232 F.3d 746, 747 (9th Cir. 2000) (dissent from denial of rehearing en banc) (Eleventh Circuit case law "of dubious validity" and following it "foment[s] a circuit split over an issue that the Supreme Court has already resolved"); *United States* v. *Standberry*, No. 99-11624 (11th Cir. Dec. 15, 1999), slip op. 4, 5 (Br. in Opp. App. A); Pet. 22 n.2 (citing additional cases). Such forbearance was warranted before the decision here because it remained

possible to reconcile the relevant authorities and to offer guidance to police officers short of requiring *Miranda*-like warnings in all circumstances. Now, however, it is not possible to do either.

c. Respondents appear to suggest that this case is distinguishable from other cases involving encounters on buses because respondents were subjected to a frisk of their persons and not merely to a search of their luggage. Br. in Opp. 10. Respondents assert that such a frisk is something to which no member of the traveling public "would likely consent" if he had a genuine choice. *Ibid.* That line of argument, however, has already been rejected by this Court, which has upheld even more intrusive searches based on consent. See, *e.g.*, *United States* v. *Mendenhall*, 446 U.S. 544, 559 (1980) (upholding strip search where defendant consented). Individuals will often voluntarily subject themselves to inconvenience to assist law enforcement for the public good; and criminals may do so in an effort to eliminate suspicion (hoping that the officers will not follow through with the search) or in the hope of more lenient treatment. Respondents' decision to cooperate thus is not inexplicable. It was simply unsuccessful in throwing the officers off the track.[2]

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[2] Respondents assert in passing (and without citation to the record) that the officers failed "to await a response before initiating their frisks." Br. in Opp. 10. The officers, however, did wait for responses. Agent Lang "requested and received permission from Brown to conduct a pat-down," Pet. App. 5a; and when Lang asked Drayton for permission to perform a pat down, Drayton responded (non-verbally) by lifting his hands off his legs to permit the search, *ibid.* The district court thus found that respondents "consented to this search," *id.* at 14a, and respondents offer no evidence suggesting that finding to be clearly erroneous. The question here thus is not whether respondents consented; it is whether the consent that was given was the product of a Fourth Amendment seizure.

2. The court of appeals' decision also conflicts with this Court's decisions in *Florida* v. *Bostick*, 501 U.S. 429 (1991), *INS* v. *Delgado*, 466 U.S. 210 (1984), and *Florida* v. *Rodriguez*, 469 U.S. 1, 5-6 (1984) (per curiam). As the petition explains, see Pet. 17-23, this Court repeatedly has rejected the use of per se rules in analyzing the reasonableness of law enforcement action and the voluntariness of consent, and has specifically declined to require, as a prerequisite to a voluntary consent, that officers warn citizens of their right to refuse cooperation. Respondents do not contend otherwise. Instead, respondents deny that the Eleventh Circuit has established a such a rule. See Br. in Opp. 14. Respondents, however, identify no circumstance under which, consistent with Eleventh Circuit case law, a bus passenger's consent to search will be deemed voluntary absent such a warning.

a. This is not a case in which the court of appeals has merely placed greater (or perhaps undue) emphasis on one of multiple factors while adhering to the totality-of-the-circumstances approach. It is instead a case in which the court of appeals has effectively converted a single factor into the only one that makes a difference. Eleventh Circuit case law now effectively requires officers to issue warnings to bus passengers, advising them of their right to refuse cooperation, as a prerequisite to a valid consent. Indeed, the court required warnings in this case even though the district court found that "everything that took place between Officer Lang and Mr. Drayton and Mr. Brown suggests that it was cooperative. There was nothing coercive, there was nothing confrontational about it." Pet. App. 13a.

See also *id.* at 3a-4a (officers showed no weapons, spoke to the passengers quietly, and said nothing to suggest that cooperation was mandatory). If warnings are mandatory in these circumstances, they are required in all cases. See *Washington*, 151 F.3d at 1358 (Black, J., dissenting) ("Short of telling the passengers of the right to refuse consent, it is difficult to conceive of any actions these officers could have taken to make this search any more reasonable. With this case as precedent, it is not clear that there will ever be any set of circumstances under which this Court can uphold a bus search if the officers do not inform the passengers of the right to refuse consent.").

Respondents rely primarily on the court of appeals' acknowledgment that per se rules are inappropriate in this context. Br. in Opp. 13. The question here, however, is not whether the court of appeals has explicitly established a *de jure* warning requirement. It is instead whether the decision has the *effect* of requiring warnings. As this Court has commented, there is nothing remarkable about an "ostensibly * * * highly fact-dependent totality-of-the-circumstances test approach-[ing] a *per se* rule in application." *Allentown Mack Sales & Serv., Inc.* v. *NLRB*, 522 U.S. 359, 373 (1998). It is precisely such a "per se rule in application" that the decision in this case has created.

b. Finally, respondents assert (Br. in Opp. 14) that the absence of a per se rule is proved by Eleventh Circuit decisions upholding the admission of evidence obtained in other bus search cases. The cases respondents cite, however, are hardly reassuring. In *United States* v. *Smith*, 201 F.3d 1317 (11th Cir. 2000) (Br. in Opp. App. C), for example, the court of appeals concluded that, under circuit precedent, it was required to find a seizure. *Id.* at 1322 (court "bound by the *Washington* court's decision on the question of seizure."). It held the evidence admissible because the seizure was supported by reasonable suspicion. *Ibid.* The published decision in *Smith* thus does not represent a departure from the de facto per se warning requirement; it instead represents an application of that requirement.[3]

Similarly, neither *United States* v. *Hammock*, 860 F.2d 390, 392 (11th Cir. 1988) (per curiam), nor *United States* v. *Fields*, 909 F.2d 470 (11th Cir. 1990), supports respondents' claim. *Hammock* did not involve consent to search; rather, it involved abandonment. 860 F.2d at 391. In that case, moreover, the defendant "initiated the conversation with the detectives, rather than the reverse." *Id.* at 393. It is not the law that police-citizen encounters on a bus are consensual only when initiated by the citizen. In *Fields* the court concluded that the bus passenger's consent was voluntary. But in *Fields* the officer warned the passengers that they "had the right to refuse to consent to the search." 909 F.2d at 472. The fact that the court of appeals will uphold consent where bus passengers are given such warnings

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[3] Respondents for the same reason err in asserting (Br. in Opp. 13-14) that a number of unpublished Eleventh Circuit cases belie the per se rule because they "balance" the competing facts and circumstances. Far from "balancing" the relevant facts and circumstances, however, the cases that respondents cite merely conclude that Eleventh Circuit precedent (including *Washington*) requires them to find a seizure, and to invalidate the passengers' consent, absent warnings of the right to refuse. See *Standberry*, slip op. 4, 5 (Br. in Opp. App. A) (notwithstanding fact that officer was "polite, calm, and not intimidating," the case "is controlled by *Washington*."); *United States* v. *Hill*, No. 99-12662 (11th Cir. July 24, 2000), slip op. 3-5 (Br. in Opp. App. B) (similar).

does not undermine the fact that it regularly invalidates consent where, as here, they are not.[4]

* * * * *

Investigations by police officers that rely on citizen cooperation are an important component of law enforcement. This Court's decisions make clear that approaching individuals to request that cooperation, even on a bus, does not amount to a Fourth Amendment seizure per se. The court of appeals' departure from that rule, and the circuit conflict it has created, warrants this Court's review.

For the foregoing reasons and those in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

NOVEMBER 2001

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[4] Respondent's reliance on *United States* v. *Cofield*, 2001 WL 1422144 (11th Cir. Nov. 14, 2001) (Resp. Supp. Br. 1), is also misplaced. In that case, the police approached the defendant in a train station, and the defendant abandoned his luggage by denying that it was his. The court of appeals held that the defendant was not in custody or subject to any sort of compulsion at the time he abandoned his luggage. *Id.* at *3. Because the police-citizen interaction in *Cofield* did not take place on a bus, but in a train *station*, it does not undermine the fact that the Eleventh Circuit has effectively established a per se warning requirement for police-citizen interactions that take place on a bus. To the contrary, *Cofield* underscores that the Eleventh Circuit subjects police-citizen encounters on a bus to unique Fourth Amendment analysis.

Supreme Court, U.S.
FILED
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No. 01-631

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2001

UNITED STATES OF AMERICA, Petitioner

v.

CHRISTOPHER DRAYTON and
CLIFTON BROWN, JR., Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENTS' SUPPLEMENTAL BRIEF

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November 28, 2001

QUESTION PRESENTED FOR REVIEW

WHETHER THE COURT OF APPEALS HAS ADOPTED A *PER SE* RULE OR HAS APPLIED THE TOTALITY-OF-THE-CIRCUMSTANCES TEST APPROVED IN FLORIDA V. BOSTICK, 501 U.S. 429 (1992)?

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United States v. Cofield, 2001 U.S. App. LEXIS 24393 (11th Cir. Nov. 14, 2001) 1

ARGUMENT

A. The Court of Appeals' Decision is Entirely Consistent With This Court's Precedent.

As supplemental authority for its argument that the court of appeals has not erected a *per se* rule that consent to a warrantless search is involuntary unless law enforcement officers first advise the defendant of the right to refuse consent (Respondent's Brief in Opposition at 11-14), Respondents cite the intervening decision in United States v. Cofield, No. 00-14689, 2001 WL 1422144, 2001 U.S. App. LEXIS 24393 * 8 (11th Cir. Nov. 14, 2001) (reversing the district court's granting of motion to suppress, considering *inter alia* in determining the issue of abandonment the fact that "there [were no] other conditions that would have led Cofield to believe that he was not free to refuse consent").

CONCLUSION

Because there is no conflict between the decision below and precedent of this Court, or between the circuits on this issue, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Attorney for Respondent Drayton

No. 01-631

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2001

UNITED STATES OF AMERICA, Petitioner

v.

CHRISTOPHER DRAYTON and
CLIFTON BROWN, JR., Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CERTIFICATE OF SERVICE

I CERTIFY, pursuant to Supreme Court Rule 29.5, that on this 28th day of November, 2001, a true copy of the Respondents' Supplemental Brief was mailed in an envelope to the Office of the United States Attorney, 111 N. Adams Street, 4th Floor, Tallahassee, FL 32301; mailed and faxed to the Office of the Solicitor General, Room 5712, Department of Justice, 950 Pennsylvania Avenue, NW, Washington, D.C. 20530-0001, Tel. (202) 633-2201 (For

Respondent); mailed to Respondent Brown's attorney, Mr. Steven Seliger, P.O. Box 324, Quincy, Florida 32353-0324; and mailed to Respondents, Mr. Christopher Drayton, 16000 Bunche Park School Drive, Opa Locka, Florida 30054, and Mr. Clifton Brown, Jr., 19220 NW 37th Avenue, Miami, Florida 33056.

All parties required to be served have been served.

Undersigned counsel represents Respondent in this action as a continuation of a previous appointment pursuant to the Criminal Justice Act, Title 19 U.S.C. § 3006A.

I further certify, under penalty of perjury, that the foregoing is true and correct.

Executed on November 28, 2001.

Respectfully submitted,

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No. 01-631

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

CHRISTOPHER DRAYTON AND CLIFTON BROWN, JR.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED: OCT. 12, 2001
CERTIORARI GRANTED: JAN. 4, 2002

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
(TALLAHASSEE)

No. 99-CR-15-ALL

UNITED STATES OF AMERICA, PLAINTIFF

v.

CHRISTOPHER DRAYTON AND
CLIFTON BROWN, JR., DEFENDANTS

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
2/8/99	1	COMPLAINT as to CLIFTON BROWN JR [4:99-m-12] (tld) [Entry date 02/08/99]
2/8/99	1	COMPLAINT as to CHRISTOPHER DRAYTON [4:99-m-13] (tld) [Entry date 02/08/99]
2/8/99	2	INITIAL APPEARANCE Minutes held; Detention Hearing set for 10:00 2/12/99 for CLIFTON BROWN JR [Court Reporter: Tape 99-4] (Defendant informed of rights.) [4:99-m-12] (tld) [Entry date 02/09/99]

DATE	DOCKET NUMBER	PROCEEDINGS
2/8/99	2	INITIAL APPEARANCE Minutes held; Detention Hearing set for 10:00 2/12/99 for CHRISTOPHER DRAYTON [Court Reporter: Tape 99-4] (Defendant informed of rights.) [4:99-m-13] (tld) [Entry date 02/09/99]
2/8/99	3	CJA 23 FINANCIAL AFFIDAVIT by CLIFTON BROWN JR [4:99-m-12] (tld) [Entry date 02/09/99]
2/8/99	3	CJA 23 FINANCIAL AFFIDAVIT by CHRISTOPHER DRAYTON [4:99-m-13] (tld) [Entry date 02/09/99]
2/8/99	4	ORDER Appointing Federal Public Defender for CLIFTON BROWN JR (Signed by Magistrate Judge William C. Sherrill Jr.) Copies sent as noted on document. [4:99-m-12] (tld) [Entry date 02/09/99]
2/8/99	4	ORDER Appointing Federal Public Defender for CHRISTOPHER DRAYTON (Signed by Magistrate Judge William C. Sherrill Jr.) Copies sent as

DATE	DOCKET NUMBER	PROCEEDINGS
		noted on document. [4:99-m-13] (tld) [Entry date 02/09/99]
		* * * * *
2/9/99	6	CJA 20 as to CLIFTON BROWN JR: Appointment of Attorney GEORGE WASHINGTON BLOW III Voucher # 0782047 Copies sent as noted on document. (Original to CJA attorney) [4:99-m –12] (tld) [Entry date 02/09/99]
2/11/99	7	MOTION by CLIFTON BROWN JR to Suppress, to Dismiss [4:99-m-12] (tld) [Entry date 02/11/99]
2/11/99	—	Motion(s) referred to Magistrate Judge William C. Sherrill Jr. as to CLIFTON BROWN JR: [7-1] motion to Suppress, [7-2] motion to Dismiss [4:99-m-12] (tld) [Entry date 02/11/99]
		* * * * *
2/12/99	7	ORDER Setting Conditions of Release as to CHRISTOPHER

DATE	DOCKET NUMBER	PROCEEDINGS
		DRAYTON Bond set to $100,000 OR for CHRISTOPHER DRAYTON. (Signed by Magistrate Judge William C. Sherrill Jr.) Copies sent to AUSA, USPO, USM, defense counsel and defendant. Copies sent as noted on document. [4:99-m–13] (tld) [Entry date 02/12/99]
		* * * * *
2/12/99	9	ORDER by Magistrate Judge William C. Sherrill Jr. as to CHRISTOPHER DRAYTON . . . Release stayed pending government appeal copies sent as noted on document. [4:99-m-13] (tld) [Entry date 02/12/99]
2/12/99	10	ORDER Setting Conditions of Release as to CLIFTON BROWN JR Bond set to $100,00 OR for CLIFTON BROWN. (Signed by Magistrate Judge William C. Sherrill Jr.) Copies sent to AUSA, USPO, USM, defense counsel

DATE	DOCKET NUMBER	PROCEEDINGS
		and defendant. Copies sent as noted on document. [4:99-m-12] (tld) [Entry date02/12/99]
2/12/99	10	MOTION by CHRISTOPHER DRAYTON to Dismiss Complaint [4:99-m-13] (tld) [Entry date 02/12/99]
2/12/99	11	Appearance BOND entered as to CLIFTON BROWN JR in Amount $100,00 OR Copies sent to AUSA, USPO, USM, defense counsel and defendant. [4:99-m-12- (tld) [Entry date 02/12/99]
2/12/99	12	ORDER by Magistrate Judge William C. Sherrill Jr. as to CLIFTON BROWN JR STAYING BOND PENDING APPEAL Copies sent as noted on document. [4:99-m-12] (tld) [Entry date 02/12/99]
2/12/99	11	ORDER by Magistrate Judge William C. Sherrill Jr. as to CHRISTOPHER DRAYTON denying [10-1] motion to Dismiss Complaint as to

DATE	DOCKET NUMBER	PROCEEDINGS
		CHRISTOPHER DRAYTON (1) Copies sent as noted on document. [4:99-m-13] (tld) [Entry date 02/12/99]
2/12/99	13	ORDER by Magistrate Judge William C. Sherrill Jr. as to CLIFTON BROWN JR denying [7-1] motion to Suppress as to CLIFTON BROWN (1), denying [7-2] motion to Dismiss as to CLIFTON BROWN (1) Copies sent as noted on document. [4:99-m-12] (tld) [Entry date 02/12/99]
2/17/99	—	Indictment returned as to CHRISTOPHER DRAYTON 4:99cr15-WS [4:99-m-13] (tld) [Entry date 02/19/99]
2/17/99	—	Indictment returned as to CLIFTON BROWN JR 4:99cr15-WS [4:99-m-12] (tld) [Entry date 02/19/99]
2/17/99	12	INDICTMENT as to CHRISTOPHER DRAYTON (1) count(s) 1, 2, CLIFTON BROWN (2) count(s) 1, 2 (Copies sent to AUSA, USPO, and USM) (sfl) [Entry date 02/22/99]

DATE	DOCKET NUMBER	PROCEEDINGS
2/19/99	13	EMERGENCY NOTICE OF APPEAL of Conditions of Release by USA as to CHRISTOPHER DRAYTON, CLIFTON BROWN JR and Motion for Stay. (sfl) [Entry date 0/22/99]
		* * * * *
2/24/99	18	Minute entry as to CHRISTOPHER DRAYTON, CLIFTON BROWN JR:, Court upholds Magistrate's Order of Conditions of Release and orders the defendants released. setting Evidentiary Hearing deadline for 10:00 3/4/99 for CHRISTOPHER DRAYTON for CLIFTON BROWN JR re: suppression motions Ct. repr. Lisa Jones (tld) [Entry date 02/24/99]
2/24/99	19	ARRAIGNMENT as to CHRISTOPHER DRAYTON held [Court Reporter: Lisa Jones] Plea not guilty as charged. (tld) [Entry date 02/24/99]

DATE	DOCKET NUMBER	PROCEEDINGS
2/24/99	20	ARRAIGNMENT as to CLIFTON BROWN JR held [Court Reporter: Lisa Jones] Plea not guilty as charged. (tld) [Entry date 02/24/99]
2/24/99	21	ORDER SETTING TRIAL as to CHRISTOPHER DRAYTON, CLIFTON BROWN JR setting Jury Trial for 9:00 4/13/99 for CHRISTOPHER DRAYTON, for CLIFTON BROWN JR; (Signed by Judge William Stafford) Copies sent as noted on document. (tld) [Entry date 02/24/99]
2/24/99	22	MOTION by CHRISTOPHER DRAYTON to Suppress Evidence Illegally Seized (sfl) [Entry date 02/24/99]
		* * * * *
2/25/99	23	NOTICE of Hearing as to CHRISTOPHER DRAYTON, CLIFTON BROWN JR.

DATE	DOCKET NUMBER	PROCEEDINGS
		Suppression hearing set for Thursday, March 4, 1999 at 10:00 AM. Copies sent as noted on document. (tdg) [Entry date 02/25/99]
2/25/99	24	MOTION by CHRISTOPHER DRAYTON to Continue evidentiary hearing (tdg) [Entry date 02/25/99]
2/25/99	25	ORDER by Judge William Stafford as to CHRISTOPHER DRAYTON granting [24-1] motion to Continue evidentiary hearing as to CHRISTOPHER DRAYTON (1) Copies sent as noted on document. (tdg) [Entry date 02/25/99]
2/25/99	26	NOTICE of Hearing as to CHRISTOPHER DRAYTON, CLIFTON BROWN JR, resetting Evidentiary Hearing deadline for 10:00 3/16/99 for CHRISTOPHER DRAYTON, for CLIFTON BROWN JR re: [22-1] motion to Suppress Evidence Illegally

DATE	DOCKET NUMBER	PROCEEDINGS
		Seized by CHRISTOPHER DRAYTON Copies sent as noted on document. (tdg) [Entry date 02/25/99]
3/10/99	27	RESPONSE by USA as to CHRISTOPHER DRAYTON, CLIFTON BROWN JR re [22-1] motion to Suppress Evidence Illegally Seized (sfl) [Entry date 03/10/99]
		* * * * *
3/15/99	28	NOTICE of Hearing as to CHRISTOPHER DRAYTON, CLIFTON BROWN JR, re-setting Evidentiary Hearing deadline for 9:00 3/16/99 for CHRISTOPHER DRAYTON, for CLIFTON BROWN JR re: Copies sent as noted on document. (tdg) [Entry date 03/15/99]
3/16/99	29	ORDER by Judge William Stafford as to CHRISTOPHER DRAYTON denying [22-1] motion to Suppress Evidence Illegally Seized as

DATE	DOCKET NUMBER	PROCEEDINGS
		to CHRISTOPHER DRAYTON (1) Copies sent as noted on document. (sfl) [Entry date 03/16/99]
3/16/99	30	MOTION by CLIFTON BROWN JR to suppress evidence (tdg) [Entry date 03/16/99]
3/16/99	31	Minute entry as to CHRISTOPHER DRAYTON, CLIFTON BROWN JR: hearing on motion to suppress evidence. Oral order denying [30-1] motion to suppress evidence as to CLIFTON BROWN (2) (tdg) [Entry date 03/16/99]
		* * * * *
4/5/99	34	Minute entry as to CLIFTON BROWN JR: Scheduled plea is cancelled. Motion for CJA counsel, George Blow, to withdraw is GRANTED. Clerk to find new counsel from CJA panel list. Trial is reset for Tuesday, April 13th to Tuesday, April 20th at 1:00 pm. TERMINATED deadline re: (tlg) [Entry date 04/05/99]

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
4/5/99	36	CJA 20 as to CLIFTON BROWN JR: Appointment of Attorney WILLIAM EDWARD BUBSEY Voucher # 0781586 by Judge William Stafford Copies sent as noted on document. (Original to CJA attorney) (tdg) [Entry date 04/06/99]
4/7/99	37	MOTION TO SUPPRESS HEARING TRANSCRIPT filed in case as to CHRISTOPHER DRAYTON, CLIFTON BROWN JR for dates of 03/16/99 (Lisa Jones Court Reporter) (sfl) [Entry date 04/08/99]
4/8/99	38	NOTICE of Appearance for CLIFTON BROWN JR by Attorney Clifton Brown, Jr. (abb) [Entry date 04/09/99]
		* * * * *
4/19/99	40	REARRAIGNMENT Minutes as to CLIFTON BROWN JR held (Court Reporter: Lisa Jones) (tdg) [Entry date 04/19/99]

DATE	DOCKET NUMBER	PROCEEDINGS
4/19/99	41	STATEMENT OF FACTS as to defendant CLIFTON BROWN JR (tdg) [Entry date 04/19/99]
4/19/99	42	Plea Agreement as to CLIFTON BROWN JR (Copies to: AUSA, USPO, Bubsey) (tdg) [Entry date 04/19/99]
4/19/99	—	PLEA of Guilty: CLIFTON BROWN (2) count(s) 1; Court accepts plea. Gvt moves to dismiss count 2. GRANTED. Sentencing set for 11:00 7/20/99 for CLIFTON BROWN JR. Court Reporter: Lisa Jones (tdg) [Entry date 04/19/99]
4/19/99	43	NOTICE of Hearing as to CLIFTON BROWN JR. Setting sentencing for 7/20/99 at 11:00 AM. Copies sent as noted on document. (tdg) [Entry date 04/19/99]
4/20/99	44	Proposed Jury Instructions by USA as to CHRISTOPHER DRAYTON (tdg) [Entry date 04/20/99]

DATE	DOCKET NUMBER	PROCEEDINGS
	* * * * *	
4/20/99	48	JURY TRIAL MINUTES. Voir dire begun as to CHRISTOPHER DRAYTON (1) count(s) 1, 2. Jury trial on 4/20/99 Verdict returned the same day. See minutes for proceeding notes. (tdg) [Entry date 04/21/99]
4/20/99	49	Clerk's Exhibit list as to CHRISTOPHER DRAYTON (tdg) [Entry date 04/21/99]
4/20/99	50	Court's Jury instructions as to CHRISTOPHER DRAYTON (tdg) [Entry date 04/21/99]
4/20/99	51	JURY VERDICT of Guilty: CHRISTOPHER DRAYTON (1) count(s) 1, 2 (tdg) [Entry date 04/21/99]
4/21/99	52	NOTICE of Hearing as to CHRISTOPHER DRAYTON, setting sentencing date for 11:00 7/20/99 for CHRISTOPHER DRAYTON Copies sent as noted on document. (tds) [Entry date 04/21/99]

DATE	DOCKET NUMBER	PROCEEDINGS
6/8/99	53	USPO LETTER Re: PSR for defendant CLIFTON BROWN JR (sfl) [Entry date 06/08/99]
6/15/99	54	LETTER USPO PSR Re: PSR Report for defendant CHRISTOPHER DRAYTON. (ddj) [Entry date 06/15/99]
6/24/99	55	MOTION by CLIFTON BROWN JR to withdraw guilty plea (sfl) [Entry date 06/25/99]
6/24/99	56	MOTION by William E. Bubsey as to CLIFTON BROWN JR to withdraw as counsel of record (sfl) [Entry date 06/25/99]
	* * * * *	
6/29/99	60	NOTICE of Hearing as to CLIFTON BROWN JR, Motion Hearing set for 2:30 7/1/99 for CLIFTON BROWN JR for [56-1] motion to withdraw as counsel of record, set for 2:30 7/1/99 for CLIFTON BROWN JR for

DATE	DOCKET NUMBER	PROCEEDINGS
		[55-1] motion to withdraw guilty plea Copies sent as noted on document. (tdg) [Entry date 06/29/99]
7/1/99	61	Minute entry as to CLIFTON BROWN JR: granting [56-1] motion to withdraw as counsel of record as to CLIFTON BROWN (2). Clerk to find replacement CJA counsel and to set an evidentiary hearing on motion to withdraw plea. (tdg) [Entry date 07/01/99]
7/6/99	63	CJA 20 as to CLIFTON BROWN JR: Appointment of Attorney Steven Seliger, Voucher # 0781902 by Judge William Stafford. Copies sent as noted on document. (Original to CJA attorney) (tdg) [Entry date 07/13/99]
7/8/99	62	NOTICE of APPEARANCE OF STEVEN SELIGER as to CLIFTON BROWN JR (sfl) [Entry date 07/09/99]

* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
9/2/99	69	Minute entry: of evidentiary hearing as to CLIFTON BROWN JR. Court Reporter: Lisa Jones. Oral order denying [55-1] motion to withdraw guilty plea as to CLIFTON BROWN (2). Clerk is to set the case for sentencing - allowing for time to revise PSR. (tdg) [Entry date 09/02/99]
9/2/99	70	SENTENCING Minutes as to CHRISTOPHER DRAYTON held. (Court Reporter: Lisa Jones) CHRISTOPHER DRAYTON (1) count(s) 1, 2. Sentence imposed: 120 months BOP as to each of counts 1 and 2 - to run concurrently. SMA of $200. Eight years of S/R with special conditions. (tdg) [Entry date 09/02/99]
9/3/99	71	OBJECTION by USA to Presentence Investigation Report as to CLIFTON BROWN JR (sfl) [Entry date 09/08/99]

DATE	DOCKET NUMBER	PROCEEDINGS
9/3/99	72	NOTICE OF APPEAL by Appeal record due on 10/4/99 for CHRISTOPHER DRAYTON (sfl) [Entry date 09/08/99]
	* * * * *	
9/14/99	75	JUDGMENT by Judge William Stafford CHRISTOPHER DRAYTON (1) count(s) 1, 2. Imprisoned for a term of 120 months on count 1 and 120 months on count II, to run concurrently with each other, with $200.00 assessment, 8 years supervised release Copies sent as noted on document. (sfl) [Entry date 09/16/99]
	* * * * *	
9/22/99	78	TRANSCRIPT re: jury trial Date(s): April 20, 1999 Court Reporter/Tape Number: Lisa Jones Volume: 1 Number of Pages: 87 Re: Jury Trial as to CHRISTOPHER DRAYTON (tld) [Entry date 09/24/99]

DATE	DOCKET NUMBER	PROCEEDINGS
	* * * * *	
11/3/99	85	CERTIFIED Record on Appeal Transmitted to USCA Re: [72-1] appeal as to CHRISTOPHER DRAYTON USCA #: 99-13814I (sfl) [Entry date 11/03/99]
11/9/99	86	SENTENCING Minutes as to CLIFTON BROWN JR held. Adjudicated guilty of count 1. Sentenced to BOP for a term of 88 months, SMA of $100, S/R of 5 years with special conditions. Count 2 dismissed. Mr. Seliger will continue representation on appeal. (Court Reporter: Lisa Jones) CLIFTON BROWN (2) count(s) 1 (tdg) [Entry date 11/09/99]
11/9/99	—	DISMISSAL of Count(s) on Government Motion as to CLIFTON BROWN JR Counts Dismissed: CLIFTON BROWN (2) count(s) 2 (als) [Entry date 01/21/00]

DATE	DOCKET NUMBER	PROCEEDINGS
11/10/99	87	ACKNOWLEDGMENT [83-1] certificate as to CHRISTOPHER DRAYTON appeal number 99-13814I (sfl) [Entry date 11/10/99]
		* * * * *
11/10/99	88	NOTICE OF APPEAL by CLIFTON BROWN (2) count(s) 1 Copies sent as noted on document. (als) [Entry date 01/21/00]
		* * * * *
11/17/99	91	JUDGMENT by Judge William Stafford CLIFTON BROWN (2) count(s) 1. Defendant plead guilty on Count 1 and was committed to the custody of United States Bureau of Prisons for a term of 88 months and to pay $100.00 SMA, Count 2 was dismissed by the Government Copies sent as noted on document. (sfl) [Entry date 11/18/99] [Edit date 11/18/99]

DATE	DOCKET NUMBER	PROCEEDINGS
11/19/99	92	Judgment Returned Executed as to CHRISTOPHER DRAYTON on 11/21/99 at location: Coleman Correctional Inst. (sfl) [Entry date 11/22/99]
		* * * * *
12/13/99	93	TRANSMITTAL of Notice of Appeal and certified copy of docket as to CLIFTON BROWN JR to USCA: [88-1] appeal (sfl) [Entry date 12/13/99]
		* * * * *
12/27/99	94	USCA #: as to CLIFTON BROWN JR Re: [88-1] appeal USCA Number: 99-15152 (amm) [Entry date 12/28/99]
12/27/99	95	USCA LETTER to CJA attorney re: CJA voucher (appeal #99-15152 (amm) [Entry date 12/28/99]
12/27/99	96	USCA LETTER re: filing fee (appeal #99-15152) (amm) [Entry date 12/28/99]

DATE	DOCKET NUMBER	PROCEEDINGS
1/5/00	97	NOTICE of appeal information sheet filed by CLIFTON BROWN JR (sfl) [Entry date 01/05/00]
1/10/00	98	ACKNOWLEDGMENT estimated time for filing transcript provided by Lisa Jones, Transcripts should be filed by 2/7/00 as to CLIFTON BROWN JR (sfl) [Entry date 01/10/00]
1/11/00	99	CERTIFICATE OF READINESS as to CLIFTON BROWN JR USCA # 99-15152 Re: Copies sent as noted on document. (sfl) [Entry date 01/11/00]
1/11/00	100	CERTIFIED Record on Appeal Transmitted to USCA Re: [88-1] appeal as to CLIFTON BROWN JR USCA #: 99-15152 (sfl) [Entry date 01/11/00]
1/11/00	101	Judgment Returned Executed as to CLIFTON BROWN JR on 12/14/99 at location: FCI, Miami. (sfl) [Entry date 01/11/00]

* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
2/22/00	108	CERTIFIED Record on Appeal Transmitted to USCA Re: as to CLIFTON BROWN JR USCA #: 99-15152 COMPLETE RECORD FOR BROWN MAILED TO USCA (sfl) [Entry date 02/22/00]
2/29/00	109	ACKNOWLEDGMENT [108-1] appeal record as to CLIFTON BROWN JR (sfl) [Entry date 02/29/00]

* * * * *

11/9/00	115	ORDER by Judge William Stafford as to CLIFTON BROWN JR Defendant shall be released to the supervision of the United States Probation Office for the Southern District of Florida pending further action in his case. Copies sent as noted on document. (sfl) [Entry date 11/09/00]
11/9/00	116	ORDER by Judge William Stafford as to CHRISTOPHER DRAYTON deft. shall be released to the

DATE	DOCKET NUMBER	PROCEEDINGS
		supervision of the United States Probation Office. Copies sent as noted on document. (sfl) [Entry date 11/09/00]
		* * * * *
12/14/00	118	ORDER by Judge William Stafford as to CLIFTON BROWN JR granting [117-1] motion to amend conditions of releaes for Christmas Holidays as to CLIFTON BROWN (2) Copies sent as noted on document. (sfl) [Entry date 12/14/00]
		* * * * *
3/9/01	119	MOTION by CLIFTON BROWN JR to Modify Conditions of Release (sfl) [Entry date 03/09/01]
3/9/01	120	ORDER by Judge William Stafford as to CLIFTON BROWN JR granting [119-1] motion to Modify Conditions of Release Copies sent as noted on document. (sfl) [Entry date 03/09/01]

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
4/20/01	122	ORDER by Judge William Stafford as to CLIFTON BROWN JR granting [121-1] motion to Modify Conditions of Release as to CLIFTON BROWN (2) Copies sent as noted on document. (als) [Entry date 04/20/01]
5/31/01	123	MANDATE OF USCA as to CHRISTOPHER DRAYTON, CLIFTON BROWN JR Re:, reversing and remanding CHRISTOPHER DRAYTON (1) count(s) 1, 2, CLIFTON BROWN (2) count(s) 1, 2 USCA #:99-13814 & 99-15152 (sfl) [Entry date 06/01/01]
6/1/01	124	RECORD on Appeal Returned from USCA Re: USCA #: 99-15152 CONSISTING OF: Number of Volumes of Pleadings: 1 Number of Volumes of Transcripts: 3 Number of Volumes of Exhibits: 2 envelopes in 99-13814 Other: Reason: appeal closed (sfl) [Entry date 06/01/01]

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
6/1/01	125	JUDGMENT by USCA Reversed and Remanded conviction (sfl) [Entry date 06/01/01]
		* * * * *
6/4/01	—	Deadline updated as to CHRISTOPHER DRAYTON, CLIFTON BROWN JR Setting deadline for checking status (w/AUSA) of remand from USCA by: 7/20/01 (als) [Entry date 06/04/01]
6/13/01	126	RECORD on Appeal Returned from USCA Re: [85-1] recommendations appeal, [81-1] number appeal, [72-1] appeal as to CHRISTOPHER DRAYTON USCA #: 99-13814-II CONSISTING OF: Number of Volumes of Pleadings: 1 Number of Volumes of Transcripts: 4 Reason: mandate previously issued (als) [Entry date 06/13/01]
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
8/23/01	132	ORDER by Judge William Stafford as to CHRISTOPHER DRAYTON, CLIFTON BROWN JR granting [128-1] motion to enforce Mandate of 11th Circuit as to CLIFTON BROWN (2), setting deadline to file status report for 9/20/01 for CHRISTOPHER DRAYTON, for CLIFTON BROWN JR Reason: Supreme Court standing re: certiorari Conditions of release modified as outlined. Steven Seliger reappointed to represent Defendant Brown nunc pro tunc to 10/24/00. Copies sent as noted on document. (als) [Entry date 08/24/01]
9/10/01	133	STATUS Report by USA as to CHRISTOPHER DRAYTON, CLIFTON BROWN JR and agreed motion to continue stay (als) [Entry date 09/11/01]
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
10/25/01	136	ORDER by Judge William Stafford as to defendant CHRISTOPHER DRAYTON, defendant CLIFTON BROWN JR granting [135-1] motion to continue Stay Staying until 1/31/02 Copies sent as noted on document. (kdc) [Entry date 10/26/01]

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT (ATLANTA)

No. 99-13814-II

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

CHRISTOPHER DRAYTON, DEFENDANT-APPELLANT

DOCKET ENTRIES

DATE	DATE 2	DOCKET ENTRY
		* * * * *
10/07/99		Briefing Notice Issued
		* * * * *
11/04/99		Record on Appeal
11/17/99		Record Excerpts
11/17/99		Appearance Form Submitted: Gwendolyn L. Spivey.
		* * * * *
11/17/99	11/5/99	Appellant Brief: Appellant-Drayton, Christopher (Atty: Gwendolyn L. Spivey)
12/20/99		Appearance Form Submitted: Terry Flynn

DATE	DATE 2	DOCKET ENTRY
12/20/99	12/15/99	Appellee Brief–Atty Terry Flynn
12/27/99		Supp. Brief, construed as Supp. Authority for Appellee
01/05/00	1/03/00	Reply Brief–Atty Randolph P. Murrell
01/11/00		Appearance Form Submitted: Michael T. Simpson
02/22/00		Supplemental Authority for Appellant
04/21/00		Supplemental Authority for Appellant
07/17/00		Sua Sponte; this appeal is consolidated with 99-15152
07/31/00		Supplemental Authority for Appellant: Appellant–Drayton Christopher (Atty: Gwendolyn L. Spivey)
09/06/00		Supplemental Authority for Appellant: Appellant–Drayton Christopher (Atty: Gwendolyn L. Spivey)
09/13/00		Supplemental Authority for Appellee: Appellee-United States of America (Atty: Michael Simpson)

DATE	DATE 2	DOCKET ENTRY
09/13/00		Gwendlyn L. Spivey argued for Appellant; Michael T. Simpson argued for Appellee
		* * * * *
10/24/00		Opinion Issued REVERSED & REMANDED. Also in filed 99-15152
10/24/00		Judgment Entered
		* * * * *
11/02/00		Motion for Extension to File Request for Rehearing
11/03/00		Telephoned atty Spivey–she is opp to mtn 4 ext to file PFR
11/14/00		Appellee's motion for an extension of time to file their petition for Rehearing En Banc up to and including December 14, 2000 is GRANTED.(EEC)j
		* * * * *
12/11/00		Motion for Extension to File Request for Rehearing (unop)
		* * * * *

DATE	DATE 2	DOCKET ENTRY
12/13/00		Appellee's second motion for an extension of time to file their Petition for Rehearing En Banc up to and including December 28, 2000 is GRANTED. (EEC)(J)
		* * * * *
12/28/00	01/02/01	Petition for Rehearing En Banc: Appellee–United States of America, (Atty: Michael Rotker): Appellee
		* * * * *
05/16/01		The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, the Petition(s) for Rehearing En Banc are DENIED.
		* * * * *

DATE	DATE 2	DOCKET ENTRY
05/29/01		Mandate Issued
		* * * * *
06/08/01	06/08/01	MDT1 (Mandate-Issuance) Issued. To: Mossing, Robert A.
08/03/01	9/13/01	Ext. for Filing Certiorari Granted: Appellee-United States of America (Atty: Jeffrey Atkins) 01A97
09/04/01	10/12/01	Ext. for Filing Certiorari Granted: Appellee-10/12/01 United States of America (Atty: Terry Flynn)
10/18/01	10/12/01	Notice of Filing Certiorari: Appellee-United States of United States of America (Atty: Terry America, Flynn) SC# 01-631
01/31/02	01/04/02	Certiorari Granted: Appellee-United States of America, (Atty: United States of America, Terry Flynn) sc# 01-631

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT (ATLANTA)

No. 99-15152

UNITED STATES OF AMERICA, PLAINTIFF

v.

CLIFTON BROWN, JR., DEFENDANT

DOCKET ENTRIES

DATE	DATE 2	DOCKET ENTRY
	* * * * *	
2/10/00		Briefing Notice Issued BR-1
	* * * * *	
02/23/00		Record on Appeal
03/13/00		Record Excerpts
03/13/00		Appearance Form Submitted: Steven Seliger
03/13/00	3/10/00	Appellant Brief: Appellant–Brown, Clifton Jr.: signed by Steven L. Seliger
04/12/00		Appearance Form Submitted: Terry Flynn

DATE	DATE 2	DOCKET ENTRY
04/14/00	4/12/00	Appellee Brief: Appellee–United States of America, (Atty: Terry Flynn)
07/17/00		Sua Sponte; This case is consolidated with 99-13814
	* * * * *	
09/13/00		Supplemental Authority for Appellee: Appellee-United States of America
09/13/00		Steven Seliger argued for Appellant; Michael T. Simpson argued for Appellee
	* * * * *	
10/24/00		Opinion Issued REVERSED & REMANDED. Also filed in 99-13814.
10/24/00		Judgment Entered
	* * * * *	
11/02/00		Motion for Extension to file Request for Rehearing
11/14/00		Appellee's motion for an extension of time to file their Petition for Rehearing En Banc up to and including December 14, 2000 is Granted. (EEC)j
	* * * * *	

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

4:99CR15-WS

THE UNITED STATES OF AMERICA, PLAINTIFF

v.

CHRISTOPHER DRAYTON AND
CLIFTON BROWN, DEFENDANTS

TRANSCRIPT OF HEARING ON MOTION TO SUPPRESS

BEFORE THE HONORABLE WILLIAM STAFFORD
SENIOR UNITED STATES DISTRICT JUDGE.

APPEARANCES:

For the Plaintiff: P. MICHAEL PATTERSON
U.S. Attorney
By: MICHAEL T. SIMPSON
Assistant U.S. Attorney

* * * * *

For the Defendant Drayton: RANDOLPH P. MURRELL
Federal Public Defender
BY: WILLIAM R. CLARK
Assistant Federal Public Defender

* * * * *

For the Defendant Brown: GEORGE W. BLOW, III
Attorney at Law

* * * * *

[2] TALLAHASSEE, FLORIDA - MARCH 16, 1999, 9:25 A.M.

* * * * *

[3] MR. SIMPSON: Your Honor, the question here is whether consent—the defendants' consent to the search of their luggage, in particular of their persons, was obtained by physical force or show of authority, or whether a reasonable person in their position would have felt free to say no to the officers' request.

You're going to learn from Investigator Rufus Lang today, the old saw that you catch more flies with honey than vinegar is true, and you catch a lot more flies with honey.

I want to speak about some of the factors that are going to be illustrated by his testimony.

[4] We are, as the United States Supreme Court said in Bostick, first of all, not looking at the mind of the beliefs of a reasonable drug courier, but a reasonable, innocent person. And the vast majority of persons riding the buses and the vast majority of persons Investigator Lang contacts are good citizens. They're not carrying drugs, they don't have anything to fear from police contact.

And one thing you will see is that the vast majority of good citizens in this country are willing to cooperate with police if you ask them nicely. And it's not because they are ordered to or commanded to or have some cattle call show of force like in the Guapi and Washington cases, but because good citizens in this society

value a safe and orderly society. And you will learn, as Investigator Lang testifies, that he understands this and he, frankly, uses it to his advantage. And the same factors that make his contacts with citizens nonconfrontational are the same factors which make citizens want to go along with him.

He does not treat passengers as suspects, even if he does suspect that they may be involved in criminal activity. He treats them as citizens. He does not ask for their ticket or their identification or even who they are. As you would a suspect, he makes a casual, polite request for assistance, and frankly he gets it a remarkably high percentage of the time. His contacts are friendly. They are brief. They are not [5] accusatory. He does not suggest that they either have committed a crime, or if they hadn't committed a crime they would let him look. He does not detain them. If they want to get off the bus, either while he's talking to or before, he lets them. If they're not interested in the search, that's their decision.

It is not an interview or an interrogation, but basically he holds himself to making one or two simple requests. And frankly, the fewer things you ask people to do, the more likely they are to do them. As quickly as possible he gets to the point of can he search their luggage or can he search their person or both.

One reason for Investigator Lang's success is, frankly, his talent, his people sense. He is friendly. He is attractive. He is soft spoken. He may be in some respects—comes across like a big old teddy bear. He reads people and their responses, and he listens to what they're saying, and frankly, I assume he must like people to be able to be so successful at this. But he is really the archetypical Officer Friendly.

One reason for his success is his audience. People on buses are obviously not there because it's glamorous or because it's fun to be on a bus. They're there because they're generally economically disadvantaged, whether they are students, or unemployed, or just plain don't have much money. [6] They need to go somewhere, and that's the only way they've got to get there.

They endure long trips. I think you're going to hear that a trip from Miami to here is ten or 12 hours, and if you're going—these defendants said they were going up to Indiana, so probably that much more to look forward to. They endure long trips in the company of total strangers. They worry about thefts, which are a problem on buses. They worry about being basically trapped in a seat for hours at a time next to somebody who may be intoxicated, whether on drugs, or alcohol, or just plain crazy, or have a weapon, or being unpleasant. And when a nice man from the police department comes along and says he's there trying to deter drugs and alcohol and weapons from the bus, and asks them politely to help them, he's protecting them. And they want to keep those things off the bus, and as long as he is minimally intrusive, they're on his side. And that's another reason for his success.

I mention the time it takes to travel on the bus. Frankly, one of the things about riding a bus is it's boring. You're there for ten or 12 hours to get here and however much—

THE COURT: Is this closing argument or is this a preview of —

MR. SIMPSON: This is a preview of what you're going to see, Your Honor. I mean there are no stewardesses handing [7] out peanuts and asking if you want

a cocktail or Coca-Cola on the bus. There are no magazines, unless you bring them yourself. There's no in-flight movies. And in this context, when people basically—if you're riding on an airplane, and you're just going an hour or two on an airplane, we all know people strike up casual conversations with total strangers.

I suggest that you can remember, and I suspect that sometime in the distant past, Your Honor, as least as a young man, must have spent a little time on the bus. With the time that's involved in that, considering the conversations that happen on a brief airline flight, I suspect people talk about everything from their grandchildren to their kidney stones to what have you. Again, it's boring. And in this context, when a police officer comes along in a nonthreatening manner, and wants to talk to them, it's a high point in a dull day, and they're interested in talking to him.

And he comes along, and not only is he physically and intellectually attractive, he is letting them into his exciting world of drug interdiction and police work, and he comes across to them as being genuinely interested in them. And in this context, even though it's only for a minute or two, and even though nothing comes of it, they like the attention, they like the break in the monotony, and it's the kind of thing when they get to the end of the trip and they meet their family members, it's something they talk about. And that's another reason they [8] go along.

The now the Guapi case noted that it is not unusual to be approached by a fellow traveler on a bus or an airplane, and therefore—

THE COURT: I have read those cases and I've read your memorandum. Mr. Simpson—

MR. SIMPSON: And that is exactly what you're going to find that Investigator Lang does; he makes those casual low key approaches.

THE COURT: Well, okay, I think I understand that, and I'm going to give everybody an opportunity to make their arguments after I've heard the evidence in the case. And I thought I was going to hear opening statement here. I think what I'm hearing is a little "Simpson On Travel," surface transportation.

MR. SIMPSON: Well, I will confess I have a few miles there, Your Honor.

THE COURT: And I have to tell you for seven years I rode the bus across the whole Commonwealth of Pennsylvania many, many, many times. I have not been on one in several years, and I trust that this—that buses haven't changed too much. I take it there are two seats on either side with an aisle down the middle, and probably a bench type seat across the back butting into the only restroom on the bus, with a driver up front, isolated, and across from him the steps down [9] to the only exit door off the bus. If that's how these things are configured, then I'm familiar with them. An overhead rack and space underneath where they have your luggage accessed only from outside. If we're in agreement that's how these buses are configured, then I think I know. And I've been down to this bus station, if they're still using either Greyhound, or the old Trailways terminal just a couple blocks from here.

I don't think—I haven't noticed any change in the structure of those places. I have been there to pick up

packages and passengers, nephews on spring break and that type thing. So I think I'm familiar with the bus station, unless it's undergone a radical change. Go ahead.

MR. SIMPSON: With that then, let me call Investigator Rufus Lang.

THE COURT: All right, fine.

DEPUTY CLERK: Please raise your right hand, sir.

RUFUS R. LANG, GOVERNMENT WITNESS, DULY SWORN.

DEPUTY CLERK: Please take a seat. Would you state your full name and spell your last name?

THE WITNESS: Rufus R. Lang. Last name spelled L-A-N-G.

DIRECT EXAMINATION

BY MR. SIMPSON:

Q. Mr. Lang, you are an investigator for the Tallahassee Police Department?

[10] A. Yes, I am.

Q. How long have you been with TPD?

A. Approximately 13 years.

Q. And during some portion of that 13 years, have you been involved with drug interdiction stops both at the bus station and also at the airport here in Tallahassee?

A. Yes, I have.

Q. Can you tell us approximately what period of time?

A. Approximately three years.

Q. Did I give you yesterday a copy of the government's opposition motions to suppress in this case?

A. Yes.

Q. Did you have a chance to read over it?

A. Yes.

Q. As far as the factual representations in that opposition, both as far as what happened concerning Defendants Drayton and Brown, and also your regular method of operation in these cases, is the government's opposition accurate?

A. Yes, sir.

Q. I want to get to some specifics of this. When you work a bus—first of all, do you work by yourself or with other officers?

A. Other officers.

Q. Normally how many?

A. Two.

[11] Q. So three total?

A. Yes.

Q. And how do you dress yourselves for this?

A. Plain clothes, normal dress. Either a large shirt or a big jacket to cover my weapon.

Q. You are armed?

A. Yes, I am.

Q. Is your weapon visible?

A. No, sir, it's not.

Q. Does your weapon make a bulge under your clothes so if somebody knew what they were doing would know it was there?

A. No.

THE COURT: Like I say, I read what you filed, and I think I know the MO on this thing, but I think what we need to focus in on is what happened on that day.

I take it you were not dressed in a coat and tie with a suit on as you are right now, right?

THE WITNESS: No, sir.

BY MR. SIMPSON:

Q. Casual clothes of some kind?

A. Yes. Usually jeans, jean jacket, or either jeans and a big shirt, depending on the weather.

Q. Did you have a badge displayed in some fashion?

A. Yes, sir, I did.

THE COURT: We're focused in on this stop of—on [12] this confrontation with Drayton and Brown in this case.

BY MR. SIMPSON:

Q. On the February 4 stop, of 1999, that involved Drayton and Brown.

A. I had my badge in my hand.

Q. And as you entered the bus that turned out to have Drayton and Brown on it, first of all, did one officer—were the other officers dressed similarly to you?

A. Yes, we were dressed in plain casual clothes.

Q. No police equipment showing, no handcuffs or night sticks or anything?

A. No, sir.

Q. Did one officer remain in the front of the bus?

A. Yes.

Q. Who was that?

A. Investigator Hoover.

Q. And where specifically at the front of the bus did Investigator Hoover remain?

A. Well, he was kneeling in the driver's seat looking over the back panel of the driver's seat.

Q. Is there anything that would prevent or make it difficult for the passengers to see Investigator Hoover in that position?

A. To see him—if you're not actually looking, yes, because there's a panel where the driver will have something behind him from the rest of the passengers and has a little shade over it [13] and it comes up to about right here, and he's kneeling in the seat just looking back at the passengers.

THE COURT: Is that like—some of them, I know, are kind of a plexiglass.

THE WITNESS: Yes, sir, plexiglass.

THE COURT: And I guess for night driving there's a curtain or drape or something that comes over.

THE WITNESS: It's like a shade, a vinyl shade that they pull down.

BY MR. SIMPSON:

Q. Like a roller blind?

A. Yes, sir.

THE COURT: But in this case, Officer Hoover was in effect on his haunches, leaning on the back of the driver's seat with his back to the windshield and his eyes to the back of the bus?

THE WITNESS: Yes, sir.

THE COURT: Okay.

BY MR. SIMPSON:

Q. And again, would he have been generally visible to passengers on the bus?

MR. BLOW: Objection, calls for speculation.

BY MR. SIMPSON:

Q. Were you standing on that bus?

A. Yes, I was.

[14] Q. Did you have occasion to look around the bus?

A. Yes.

Q. Was he generally visible from where you were when you were in the passenger area?

A. Yes, I could see him.

Q. Was he holding his badge up?

A. No, sir.

Q. Now, the other officer you said was Investigator Blackburn?

A. Yes

Q. And what did Investigator Blackburn do when he got on the bus?

A. Investigator Blackburn boarded the bus before I boarded the bus. He proceeded to the very back of the bus, which is where the bench seat of the bus next to the bathroom.

He went straight to the back of the bus and made contact with the passenger that was sitting at the very back of the bus.

Q. And in general, what are the purposes—are you actually the officer that makes the primary—who is making the primary contacts that day?

A. Yes, sir.

Q. What is the primary purpose of having the other two officers on the bus?

A. Investigator Hoover is observing passengers' reactions to [15] what I am doing for my safety. Investigator Blackburn is also doing the same. He's observing the passengers while I make contacts with whoever I am contacting on the bus.

Q. Does Investigator Blackburn in this position ever make contact with passengers himself?

A. Yes. Usually he make contact with the person that's in the very, very back on the bench because he's in front of me when we go to the back of the bus. So he usually made contact with the very first person, which is on the bathroom in the back on the bench seat. He would usually make contact with that person.

Q. Do you know if he did so on this day?

A. Yes, sir, he did.

THE COURT: Let me ask you, as you work forward —as I understand, you work from the back of the bus forward?

THE WITNESS: Yes, sir.

THE COURT: Does he stay in tandem with you as you work forward, or does he remain back there near the restroom?

THE WITNESS: He stays back near the restroom.

BY MR. SIMPSON:

Q. And getting back to the specific bus that these defendants were on, as you three officers boarded the bus, did any of you or anyone else make any kind of general announcement to the bus?

A. No, sir, we did not make a general announcement.

[16] Q. Did you any of you hold up your badge so that everyone on the bus could see it?

A. No, sir.

Q. Did any of you issue any general requests or instructions to the bus passengers as a whole?

A. No, sir.

Q. Were Mr. Drayton and Mr. Brown the first passengers that you had contact with that day?

A. No, sir.

Q. Why don't you start from the point where you got on the bus and walk us through everything you did and everything you said.

A. Investigator Blackburn boarded the bus before myself, and he walked straight to the back of the bus, which is where the bench seat is in the back next to the bathroom. We always made contact with the very last person in the bus because that's where we start before we start working the bus.

It was a white male sitting on the bench seat in the very very back by himself. Investigator Blackburn made contact with him, identified himself and obtained consent in reference to checking his luggage. In the meantime, I was standing there waiting until he get finished. As soon as he finished—

THE COURT: Were you in the back of the bus?

THE WITNESS: Yes, sir. I went to the very back with him. He was in front of me and I was standing just behind him, [17] as he was talking to the person in the back of the bus. We both proceeded to the very back. At that point in time when he finished, I began working my way back forward.

BY MR. SIMPSON:

Q. And when Investigator Blackburn checked that person's luggage, did he find any contraband?

A. No, sir, he didn't find any contraband.

Q. You started working your way forward?

A. Yes, I started working my way forward. I talked with the next person that was the seat up front from the one in the back, and I talked with that person briefly, and I decided I didn't want to check that particular person.

Q. And on what basis do you decide who you want to check and who you don't want to check?

A. I usually talk to people who are coming from southern cities like South Florida, Miami, Tampa, coming up this way. If you're coming from somewhere like Chattahoochee, Gainesville, Monticello—I only have a brief time to be on the bus. I can't detain the bus, and I

don't talk to everybody, but I make sure that I put a piece of luggage, which is above them, with everybody.

So that particular person I asked him did he have any luggage above his head and he said no, and I continued to move on to the next person, which was right across from him on the right.

[18] I'm not sure where that particular person came from, but I identified myself and I asked for consent and I was given consent to check his luggage.

THE COURT: Let me interject here. There is no passenger manifest, as there would be, say, on an airline, or where the person's name is on a ticket, and their destination and their point of departure is not listed on any sort of passenger manifest or—

THE WITNESS: No, sir.

THE COURT: Or I guess kind of a passenger bill of lading type thing. There's no such thing. So you have no way of—if somebody actually came from Miami and told you they got on in Lake City, there's no way you could verify that?

THE WITNESS: No, sir.

BY MR. SIMPSON:

Q. Let me ask you, Investigator Lang, when you talk to passengers, do you ask to see their ticket?

A. No, sir.

Q. Do you ask them to show you identification?

A. No, sir.

Q. Do you ask them what their name is?

A. No, sir.

Q. Now you've got a second passenger, I believe, and you said that this second passenger had agreed to let you check his luggage?

[19] A. Yes, sir, he did.

Q. Did you find any contraband in there?

A. No, sir, I didn't.

Q. Now where was that passenger in relationship to Mr. Drayton and Mr. Brown?

A. He was sitting on the passenger side of the bus, not the driver's side, but the passenger's side, about one seat back, right next to the bathroom.

Q. Is that the same side that Drayton and Brown are on, or the opposite side?

A. The opposite side from Drayton and Brown.

Q. So one seat back and across the aisle?

A. Yes, sir.

Q. Now when you speak to passengers on a bus, how do you—how loud do you speak to them?

A. I speak directly to that particular person. I'm talking generally directly to that person and not to anybody else. So my total focus is to that person.

Q. Are you speaking in tones which you would expect to carry throughout the bus?

A. Yes. I am being very polite and just carrying a general conversation with that person, so my conversation is totally to that person.

Q. I think that was the question. Is it just with that person, or are you trying to speak loud enough for other people [20] to hear what you're doing?

A. It's just for that one particular person.

Q. Are you doing anything to—let me go on. From there what happens?

A. From there, after I asked the gentleman did he have any luggage above, and he said yes, and I got to the point where I could check his baggage, I didn't find anything in his luggage. I went across to Mr. Brown and Mr. Drayton—

Q. Do you recall which is Mr. Brown and [w]hich was Mr. Drayton? Who was on the aisle and who was at the window?

A. I recall he was sitting next to the window, the gentleman with the blue sweater on, and this gentleman with the jacket on was sitting in the aisle.

THE COURT: Are these individual seats more like a bucket seat type of—

THE WITNESS: Yes, sir.

THE COURT: As contrasted to a bench type seat?

THE WITNESS: Yes, sir.

BY MR. SIMPSON:

Q. Is there some kind of arm rest between the seats?

A. I'm not sure.

Q. Or do you recall?

A. I don't recall.

MR. BLOW: Your Honor, so that the record is—reflects what's going on here, the person seated next to the [21] window that he identified is Mr. Brown.

MR. SIMPSON: Thank you, Mr. Blow.

BY MR. SIMPSON:

Q. Where are you standing when you begin talking to Mr. Drayton and Mr. Brown?

A. If—

THE COURT: Move the furniture around, whatever you want. Those chairs are movable.

THE WITNESS: If this is the aisle and this is the seat, this is the aisle right here where I'm walking. I'm standing right here. Mr. Brown is seated right here and Mr. Drayton is seated right here, and I'm standing approximately right here.

MR. SIMPSON: If I may—

THE COURT: There's one right here by the door.

MR. SIMPSON: Let's get two chairs to represent the seats they're in. And if you'll position yourself—

THE WITNESS: This is the aisle right here, and this is the back of the bus. I'm standing right here.

THE COURT: Which way are you facing?

THE WITNESS: This is the front of the bus.

THE COURT: All right.

THE WITNESS: And I'm standing right here.

THE COURT: So you've already worked one row of seats?

THE WITNESS: Yes, sir.

[22] BY MR. SIMPSON:

Q. Mr. Brown is on the window; Mr. Drayton is in the aisle?

MR. BLOW: Your Honor, if you wouldn't mind, could we have the defendants sit there to give the demonstration a little more realism?

THE COURT: If you want to. I can't—go ahead. (Defendants comply)

BY MR. SIMPSON:

Q. Mr. Lang, I understand these are probably not exactly the kind of seats they've got on the bus. Are they larger, smaller or any significant—

THE COURT: And what they're sitting in, for the record, are two generic, gun lock, individual chairs that we use in courtrooms here and throughout the country. I have some similar ones, different color, in my chambers, and I'm sure that any court reporter or any court of appeals judge listening to this knows exactly what I'm talking about, but the chairs are just standard individual chairs with wooden arm rests and leather seats and back.

BY MR. SIMPSON:

Q. Would the—in the seats on the bus—first of all, are the backs any higher, or the same height, or lower than these are?

A. I think they're a little bit higher.

Q. Did the defendants—on the bus, would the defendants [23] have any more seating room? Did the seats seem to be wider?

A. I think this is about equal to the width.

Q. And I don't remember, is the aisleway on the bus at a level of the floors or the seats? That is, would you be standing lower in the aisleway, or standing at the same level?

A. Same level.

Q. And do I recall correctly there is some kind of an overhead luggage rack?

A. Yes, sir.

Q. Does it extend over both passenger seats or just one?

A. Both passenger seats.

Q. And about how much clearance is there over the passenger's head?

A. About two feet, two to three feet.

Q. If a passenger stands up, does he have to duck his head to get out in the aisle?

A. From the inside you would have to stand up and duck your head.

Q. From the outside you can—

A. From the outside you can pretty much get out.

Q. If you would, continue with your actions and statements to Mr. Brown and Mr. Drayton?

A. After speaking with this gentleman on this side, I proceeded up to Mr. Drayton and Mr. Brown, and I lean over from here and said, "I'm Investigator Lang with the Tallahassee [24] Police Department. We're conducting bus interdiction, attempting to deter drugs and illegal weapons being transported on the bus." And I say, "Do you have any bags on the bus?" And they

both pointed up above their head to a green luggage bag, which was approximately one seat up above them.

Q. Were you able to get that statement completely out, or that question completely out, before they responded?

A. Yes. Just before I can get finished, they both pointed up here, and I asked—I said, "Do you mind if I check it?" And he said, "Go ahead."

Q. Who said, "Go ahead"?

A. Brown.

MR. BLOW: Your Honor, he's standing directly beside Mr. Drayton.

THE COURT: I want the record to reflect Officer Lang is standing with his back to the rear of the bus and facing the front of the bus and approaching then from over the right shoulder of the—whichever defendant is sitting on the aisle.

THE WITNESS: Right, sir.

THE COURT: Is that right? You're not coming up and face to face with them; you're talking to them from kind of their right side?

THE WITNESS: Yes, sir. I was somewhat like this. On his right side.

THE COURT: Bending over a little bit?

[25] THE WITNESS: Yes, sir, like this, with the badge directly talking to these two gentlemen.

THE COURT: Was it kind of "in your face," to use the current expression?

THE WITNESS: Yes, his head was turned—his attention was turned towards me, and his was also, and

I was like this with the badge. But Mr. Brown was like the owner of the luggage. He did more of the pointing, and it was like it was mine. So he was the one pointing.

BY MR. SIMPSON:

Q. Let me—I think the question the judge was asking, was there anything confrontational about your discussions?

A. No, sir. No, sir.

Q. Now, the distance—

THE COURT: I said "in your face," I meant that in quotes, kind of a colloquial expression.

BY MR. SIMPSON:

Q. The distance between your face and Mr. Drayton's face was then somewhere in the neighborhood of 12 to 18 inches?

A. Yes.

Q. And a couple of feet over from Mr. Brown?

A. Yes.

Q. How loud are you speaking at that point?

A. About just like this, just talking to them in my tone of voice right now.

[26] Q. Is there a reason you don't speak more loudly?

MR. BLOW: Again, Your Honor, I presume the record will reflect, I presume Your Honor heard what he was saying, there's no microphones, so his voice is obviously carrying for a considerable distance, however quietly he may be talking.

THE COURT: I hear him, yes. It's—it's not as strong as when he was testifying, but, go ahead.

BY MR. SIMPSON:

Q. Is there a reason you don't speak more loudly?

A. Well, I'm talking to the gentleman, or whoever I'm in contact with at that time. I'm talking to that particular person. I'm not trying to talk to everybody else. My total focus is to that particular person. I'm not talking loud. I'm being as friendly and courteous, and I'm using, "How you doing?" this type of—the tone of voice that I'm using. I'm not trying to be coercive—trying to sound like I'm a big, bad cop or anything like that. I'm just talking to them in a nice tone of on voice.

Q. And when you hold your badge up—when you held your badge up to Mr. Drayton and Mr. Brown, how long did you display the badge?

A. Long enough for him to recognize what it was. And when I was through with my time of my introduction of myself of what I was doing.

Q. Do you continue to hold up after they've had a chance to see what it is?

[27] A. Yes. Once he saw what it was and I explained who I was, I put it back in my pocket.

Q. And other than identifying yourself with the badge and saying that you were the police department, do you do anything else to identify yourself or to establish your authority?

A. Say that again.

Q. Other than saying that you're with the police department and showing your badge, do you do anything else to show who you are or to establish your authority or anything?

A. No, sir.

Q. After—I think we've gotten to the point where you identified the bag, and I'm sorry, what happens after they pointed to the green bag?

A. I asked did he mind if I search his bag.

Q. This was Mr. Brown?

A. Yes, sir. And I was asking in general the way I was speaking. I was actually talking to the both of them, but Mr. Brown did the talking saying—and they both pointed to the bag, but Mr. Brown did the talking and said it was that bag.

Q. Now you had some opportunity to speak to both of these men both on the bus and later?

A. Yes, sir, I did.

Q. Did either of them appear to be intoxicated on alcohol or [28] drugs or anything?

A. No, sir.

Q. Did either of them appear to have any difficulties understanding the English language?

A. No, sir.

Q. Did either of them at any point ask you to repeat yourself, or to explain yourself, or anything like that?

A. No, sir.

Q. Did either of them ever ask—did either of them hesitate in responding to you?

A. No. Actually they was very cooperative, very nice. It was—they were overcooperative, if you ask me.

It was like, "I don't mind doing this. Go ahead, check it. We don't have anything to hide." That's kind of the impression I got, like, "Hey, there it is. Go ahead."

Q. Okay. Did either of them at any point during the day appear to be suffering from any mental or educational impairments?

A. No, sir.

MR. BLOW: Objection, unless he's got some qualification to judge educational impairments, Judge.

BY MR. SIMPSON:

Q. Mr. Lang, you've been a police officer 13 years?

A. Yes, sir.

Q. And how frequently during your work do you deal with [29] citizens from the public?

A. Practically the entire time you're working, every day.

Q. And have you had occasion to deal with people who you learn in one fashion or other were intoxicated on drugs or alcohol?

A. Yes, sir.

Q. Have you had occasion to deal with people who have had some kind of significant mental disorders?

A. Yes.

Q. Have you had occasion to deal with people who had difficulty with the English language?

A. Yes, sir.

Q. Did either of these gentlemen display any signs of any of those problems?

A. No, sir.

Q. After Mr. Brown said you could search his luggage, what did you do?

A. I reached up and took the bag from above his head, and I took it down, and I turned around to Investigator Blackburn and handed the bag to him and asked him to check. I came back and brought my attention and noticed that Mr. Brown and Mr. Drayton were both wearing large jackets and baggy pants.

Q. Is there some significance to that in your mind?

A. Well, the weather was warm, and they were going north, but I mean they had the jackets on. So I just thought it was kind [30] of odd to have, you know, baggy pants and big jacket like that. And during my time working on the bus, I—people have been known to conceal weapons or narcotics on their person.

Q. Baggy plants pants play into that?

A. Yes, sir.

Q. How is that?

A. Because it's easy to conceal narcotics in your waist area without it being noticed, or bulges.

Q. And after you had given the bag to Mr. Blackburn, what did you do?

A. I asked Mr. Brown if he had any weapons or drugs on him. And I say, "Do you mind if I check your person?"

Q. How did Mr. Brown react when you began these questions?

A. He said, "Sure." He went into his pocket and he pulled out a cell phone. He opened up his coat like so and held up like this. I reached across Mr. Drayton.

Q. If you would, show us exactly what you did.

A. If I'm standing here, Mr. Brown said, "Sure." He kind of leaned up in the seat and turned toward me, took a phone out of his pocket and he opened up his jacket. I leaned over, I touched his jacket here and looked in that pocket, and I checked this one, and then I checked his waist area. And I asked him would he lean up for me, and he leaned up. So I checked from behind. And then I turned around and I just touched right here on the side.

[31] Q. Go ahead, show us exactly what you did.

A. He pretty much did his hands like this. I touched right here and I touched right there, and I did this, and I said, "Would you lean up for me?" He leaned up. And I touched right here on his pockets, sort of like so.

THE COURT: Talking about the groin or upper part of the legs?

THE WITNESS: Right in the upper part of the legs, right in here.

MR. SIMPSON: And if the record may reflect, Mr. Lang is illustrating with his hands running down the crease on the front of the pants from the waistband down.

THE WITNESS: Yes, sir, right here. And the pants that he was wearing were—as he was sitting, were pretty much pushed—they were baggy pants. They were pushed—the seat of his pants were down lower.

THE COURT: You mean the loose fitting type things, double pleats in the front, that type thing?

THE WITNESS: Yes, sir. And he was turned kind of like sideways in the seat sitting there.

BY MR. SIMPSON:

Q. You said he turned sideways towards—facing you?

A. Sideways towards me when I asked to check his person.

Q. What did you find when you felt the tops of Mr. Brown's legs?

[32] A. I felt a hard object on both sides in this area right here. And—

Q. Did that appear to be some part of Mr. Brown himself?

A. No, sir, it didn't. It appeared to be something other than that. And I asked him would he mind standing up for me.

Q. Have you found such packages on other persons in other pat downs?

A. Yes, sir, I have.

Q. And in your experience, what do those kinds of packages generally turn out to be?

A. Contraband or a weapon.

Q. And when you asked Mr. Brown if he would mind standing up, what did he do?

A. He politely stood up with no—I mean he stood up.

Q. Mr. Brown, if you would, stand up, please. And lead us through what happened.

THE COURT: He's at the window seat?

THE WITNESS: Yes, sir.

BY MR. SIMPSON:

Q. So there is—the aisle is?

A. Right here, where I am right now.

Q. And he's got to get past Mr. Drayton to get out of the aisle?

A. True.

Q. And I take it there's not a tremendous amount of leg room. [33] How did he get out?

A. I asked him would he mind getting out. And I turned him like this and I look up at Investigator Hoover, who is at the front of the bus, and I told Investigator Hoover to come.

Q. Waving with your right hand waving Mr. Hoover back?

A. And Investigator Hoover come to me, and Investigator Blackburn handed me a pair of handcuffs, and I cuffed him right here, and he walked up to Investigator Hoover, and he walked him off the bus.

Q. Now when you felt the objects on Mr. Brown's —and Mr. Brown, you can resume your seat over here.

When you felt the objects on Mr. Brown's thighs, how did Mr. Brown react?

A. He just kind of dropped his head but didn't say anything.

MR. BLOW: Objection, Judge, this is not relevant to the issue of consent in this case.

THE COURT: Objection overruled.

BY MR. SIMPSON:

Q. You said he dropped his head?

A. Yes, and he didn't say anything. Didn't make any—didn't question me, didn't make any motion, didn't say anything, just dropped his head. And I asked him did he mind standing up, and he did.

Q. And after you dealt with Mr. Brown, what do you do?

A. I went back to Mr. Drayton, "Mind if I check you?" And he [34] did the same thing he's doing right now.

Q. Hands lifted maybe eight inches off his legs?

A. And I patted here and here, and I felt the same thing with him. And I asked him to stand up, and he stood up, and I escorted him off the bus.

Q. Was he also handcuffed before he actually got off the bus?

A. Yes, sir.

Q. And at what point—you can have your seat too, Mr. Drayton. At what point did you check—you may resume your seat also.

At what point did you actually look inside the defendants' pants?

A. We escorted them from the bus area back across the back parking lot of the bus station to the Trailways, from the Greyhound to the Trailways where our vehicles was parked. At that point we began talking—I mean Investigator Hoover was talking to Mr. Brown and I was talking to Mr. Drayton.

Q. And did you have any conversation with him as to why they were taken off the bus?

A. In the process of walking over to the car, I looked at Mr. Brown and I asked him, I say, "Do you

understand why we're taking you off the bus?" something to that notion? I said, "You understand why we're talking you off the bus?"

And he said, "Yes."

Q. And at some point did you find—did you actually [35] physically lay eyes on some contraband?

A. Yes, sir.

Q. How did you get to that?

A. When we got over to that particular place, we read both of them their Miranda rights, and I asked him about what was in his pants.

Q. Asked who?

A. Mr. Brown was the first one.

Q. Okay.

A. And we were over—which the area that we was in was out of the view of the public from the bus station. It was just—it's the parking lot where our cars were, and it was next to the Trailways building. And I began looking in Mr. Brown's trousers, and when I unbuttoned his pants around the truck, I noticed that he had on several pair of boxer shorts. And in between the boxers, taped to his pants, was three bundles of duct tape about this big in diameter.

Q. Holding your fingers up, maybe an inch and a half to two inches high and five inches long?

A. Yes.

Q. And did you eventually open those packages?

A. Yes.

Q. Do I have it correct that Mr. Brown had 483 grams, and Mr. Drayton had about 295 grams in two bundles?

A. Yes.

[36] Q. Now, do I correctly assume from the fact that you had put handcuffs on these men before they got off the bus that you had determined to arrest them at that point?

A. Yes, sir, I did.

Q. Do you have any idea about how many times you have previously found such objects concealed on a person's person?

A. Out of the number of times that I have been, it's been concealed in that area. The majority—let me put it like this, the majority of the times that I found something on someone, that's where it's found. If it's on their person, it's found in that area.

Q. When you find things in that area, would this be something that's happened more or less than ten times?

A. More.

Q. More or less than 20 times?

A. More.

Q. More or less than 30 times?

A. I would say more.

Q. And how frequently does it turn out that you find these kinds of objects, only to discover on actual examination that it's some noncontraband item? How often do you do this and it doesn't turn out to be drugs or weapons?

A. I've never done it, and nothing other than contraband.

Q. Now, when you found the objects on Mr. Brown, as you continued to deal with him and as you deal with Mr. Drayton, [37] once you found something, does your tone of voice change?

A. No, sir.

Q. Do you change from requesting cooperation to directing cooperation, that is you order them around?

A. No, sir, I remain cooperative to him, treat them the same way I've treated them the whole time.

Q. Now, let me ask you, in the time you're dealing with Mr. Drayton and Mr. Brown, up until the time when you find these items, did you do anything to prevent them either from getting out of their seats and into the aisle or getting off of the bus entirely?

A. No, sir, I didn't.

Q. Does it ever happen that people decide to get off the bus while you're conducting one of your programs?

A. Yes, sir, they do.

Q. And what happens when someone attempts to get off the bus and you haven't either finished dealing with them or haven't gotten to them yet?

A. Let them off the bus or turn to the side and let them come past me.

Q. And let me ask you, if you go to work the buses, are there particular times of days when buses converge in Tallahassee?

A. Yes, sir.

Q. What times are those?

A. Usually 5:00 a.m. and noontime.

[38] Q. And at those times, about how many buses will be coming in and out of Tallahassee?

A. At 5:00 a.m, we usually get about six buses in in the morning, and at noontime, we get anywhere from nine to ten.

Q. Will you be boarding all the buses?

A. No, sir.

Q. Why not?

A. I usually—the buses that are heading south, I don't really worry about them, because we don't have a whole lot of time, so I particularly concentrate on the buses that are coming north and traveling west, coming from the south, and they give us an opportunity to check each and every bus that's coming from the south.

Q. If you check all the buses that are coming from the south, about how many buses is that?

A. Four or five.

Q. What kind of time window do you have to work a particular bus?

A. We are on the bus anywhere from 15 to 20 minutes, no more.

Q. What sets the limits on how long you can be on the bus?

A. The driver, and us having enough time to check another bus before it's time for it to leave.

Q. Let me ask you, do you ever stay on the bus so long that the bus has to leave late?

A. No, sir.

[39] Q. Or that the driver is getting impatient?

A. No, sir.

Q. Do you let the bus driver know before you check his bus?

A. Yes, sir.

Q. What if the bus driver said, "I'm half an hour late already"?

A. We don't board the bus.

Q. And when people do decide to get off the bus while you're on it, is that apparently a response to your being there, or what's going on?

A. No, sometimes people get on the bus—we get on—if they got a little bit more time, they want to get back off and smoke, or they want to go back inside for a drink or something like that, realizing they have a little more time. The majority of the time they get back off the bus to go smoke.

Q. Do you ever have situations where—let me back up. If you're working a bus and you've got this 15- to 20-minute window, about how many people can you deal with in that time?

A. We usually do two or three people, but we don't—and that's just long enough to check the two or three people that's on the bus and we get off the bus. We try not to stay on there 15, 20 minutes.

Q. Does it ever happen that people don't want to let you search their luggage or their persons?

A. Yes, sir.

[40] Q. And when that happens, what happens?

A. We just go on to the next person, say, "Have a nice day," or, "I understand, and we would like for your cooperation, but you don't have to." And we'll go on to the next person.

Q. Do you try to argue them into it?

A. No, sir.

Q. Do you threaten them?

A. No, sir.

Q. Tell them you're going to get a search warrant?

A. No.

Q. Do you tell them that an innocent person would let them search?

A. No, I don't. I just leave it be. I just go on to the next person.

Q. Let me ask you. If a person tells you they're not interested in being searched, and you go on to the next person, does that seem to affect what the next person does?

A. No.

Q. And are there occasions when you work buses, say every day for a week, at least one of the shifts?

A. Yes.

Q. And in a week's time of working the buses, about how many people might you expect not to wish to be searched?

A. Maybe one. Maybe one.

Q. Do you exclusively search black people?

[41] A. No, sir.

Q. Do you also search white people?

A. Yes, sir.

Q. Do you also search Hispanic people?

A. Yes, sir.

Q. Do you ever find drugs on white people and Hispanic people?

A. Yes, I do.

Q. Do the people you come in contact with ever comment on the fact that here the police are on the bus checking for drugs and weapons and alcohol?

A. Yes, sir.

Q. What kind of things do people say to you?

MR. BLOW: Objection to the relevancy, hearsay.

THE COURT: Sustained.

BY MR. SIMPSON:

Q. Are the reactions of the people you speak to confrontational?

A. No, sir.

Q. Are there ever situations in which the person wants to ask you about drug interdiction?

A. Yes, sir. I mean lots of time people strike up conversations with us in reference to what we're doing and sometime they tell us that they—

MR. BLOW: Objection to the hearsay.

[42] MR. SIMPSON: Your Honor, this goes to the manner of Mr. Lang, and the reaction he engenders are based upon the manner in which he approaches people, and it's relevant to the whole question of whether he's dominating them or using some show of authority, or

whether in fact this is in fact, as he testifies, a friendly encounter.

THE COURT: So you're saying that the response he gets is relevant on—as to the tone of his voice and his approach to the passengers?

MR. SIMPSON: Yes, sir.

THE COURT: All right, for that purpose I'll let it in.

BY MR. SIMPSON:

Q. Go ahead.

A. They usually ask questions about what we're doing, and do we ever—are we ever successful in reference to what we're doing. And we have people saying that they appreciate it because it makes them feel safe on the bus, so they know that there's no weapons or alcohol or stuff like that, because they feel safe.

Q. Let me ask you, are you aware as a police officer whether there are ever any problems unrelated to your work on the buses? That is, does the police department get calls from the bus station?

A. Yes, sir.

[43] Q. And do you have any idea what frequency the police department gets calls?

A. I would say sometimes three or four a day I get calls.

Q. And what kinds of complaints do y'all get from the bus station?

THE COURT: These are Greyhound people that call you?

THE WITNESS: Yes, sir. They call in reference to—

MR. BLOW: Again, the relevance of this to the consent of these individuals on that bus on that day.

MR. SIMPSON: And it goes to the state of the mind of the passengers when Mr. Lang approaches them and what—as I represented before—whether they do have legitimate fears of people with guns and alcohol and weapons on the bus.

MR. BLOW: There's nothing to suggest that the passengers know what the police are being called by Greyhound employees for.

BY MR. SIMPSON:

Q. When the bus station calls you, is it because the bus drivers complain or the passengers complain, or some of each?

A. Usually—

THE COURT: Let me see. This is when the Greyhound—when the bus people call the police station, and how is that relevant to what happened in this case?

MR. SIMPSON: Your Honor, as I suggested earlier, when the officers arrive, they are viewed by the vast majority of [44] the passengers as their protectors, as people who are helping them. And that explains the passenger's reaction when Mr. Lang approaches them.

THE COURT: Fine, but in this case, is there any indication that it was the driver, or anybody worked for the Greyhound bus lines that called the police, or were they just there—

MR. SIMPSON: No, this is—

THE COURT:—doing their normal stakeout or whatever?

MR. SIMPSON: This was not in response to a call.

THE COURT: Okay. And I heard his testimony as to why the one officer was in the driver's seat looking aft and the other passenger is aft looking forward. I understand all that. But if there's no call on this one, I think Mr. Blow's objection is well taken. I'll sustain it.

Anything else, Mr. Simpson?

MR. SIMPSON: Yes, Your Honor. May I have just one moment, Your Honor?

BY MR. SIMPSON:

Q. Other than the fact that it eventually resulted in the discovery of the cocaine in this case, was your encounter with Mr. Drayton and Mr. Brown in any serious way different from your encounters with the other people you deal with on the bus?

A. No, sir.

[45] MR. SIMPSON: No further questions.

THE COURT: All right, let's take a break for about ten minutes.

(Recess from 10:20 a.m. until 10:30 a.m.)

THE COURT: Please be seated. Mr. Lang back on the stand.

Any questions, Mr. Blow or Mr. Clark?

CROSS-EXAMINATION

BY MR. CLARK:

Q. Mr. Lang, let me ask you a couple of questions about what you've testified about. Now you said on this particular day, February the 4th, that you had your badge in your hand when you confronted Mr. Drayton and Mr. Brown?

A. Yes, sir. I either had—I wear my badge two ways, either around my neck or in my hand.

Q. And is one method more preferable than the other?

A. No. Usually I have two badges. And whichever one I have on me at the time, I use that one. Because I have one I hang around my neck and I have one in my hand.

Q. But you're sure on this particular occasion the badge was in your hand?

A. I'm not exactly sure. It could have been in my hand or either around my neck, but one of the ways I know my badge was present. If it was around my neck I usually have it like this, or if not around my neck, I have it in my hand and I display it [46] like this.

Q. So when you approached Mr. Brown and Mr. Drayton in their seats, then you either leaned over and showed them your badge that was around your neck or you held your hand out?

A. Yes, sir.

Q. And then you put it away?

A. Yes, sir, either it fell back here or either I put it in my pocket.

Q. Where was your gun when this was taking place?

A. It was on this side.

Q. On your right side?

A. Yes, sir.

Q. In a holster or fanny pack or—

A. In a holster.

Q. And it was covered up on this particular day in what manner?

A. I don't recall, but I know it was covered up with either a shirt or a jacket.

Q. You also said that when you get on the bus, Officer Blackburn goes to the rear of the bus, and Officer Hoover stays in the front?

A. Yes.

Q. Does Officer Hoover stand in the aisle on occasion, or does he always sit in the seat?

A. He always sits in the seat.

[47] Q. When do you approach the bus if you have decided you're going to search it? Do you wait until all the passengers have gotten on board?

A. Yes, sir. Usually we—the bus driver will take tickets—I mean before passengers get on the bus, or he'll let all the passengers on the bus and then he'll, you know, walk back and take the tickets. But this particular day, he took the tickets from the beginning, before they got on the bus.

THE COURT: This is at the front door of the bus?

THE WITNESS: Yes, sir.

THE COURT: Front door standing open and the driver is there taking tickets, and then the people get on one at a time?

THE WITNESS: Yes, sir.

BY MR. CLARK:

Q. And how long did you watch the driver take the tickets?

A. At this particular time we had already observed —just observing people in the terminal. We might have checked another bus. We don't sit there and wait on that particular bus until it get full. They start loading buses at one time. And there's like—once they —there's two buses usually being loaded at the same time, or—and whichever ones get finished first and the passengers get settled on the bus, that's the one we'll board.

Q. What is it about—how do you know that everybody is on [48] the bus and the driver is ready to leave that tells you now is the time to search?

A. Before the driver get off the bus, he usually say, "It's all yours," something to that, or either he'll just get off and close the door, and we'll be standing there, and we'll say, "It's all right if we check it?"

And he'll say, "Yes," because at that time he's going into the office there.

Q. What does the driver do when he goes into the office? Do you know?

A. He goes into the office to—if I'm not mistaken, to document how many passengers he have on the bus, how many tickets he's taken, or where they're going, something similar to that, and then he have to call the office in Texas and punch in something over the phone, and then once they finish all the paperwork they have to do, then they come out and board the bus and leave.

Q. How long does that take? Do you know?

A. I'm not sure. It varies.

Q. The driver usually waiting for you when you get off the bus?

A. Sometimes he's standing there when we come off the bus. When we see the driver coming up, we are usually about finished, or we're getting ready to get off the bus anyway.

Q. How many people were on the bus on this particular day?

[49] A. I'm not absolutely sure, but it was in the neighorhood of 25 to 30.

Q. Is that an average size for the people on the bus for the buses you search?

A. Yes, sometimes. It varies.

Q. And how many times—how many buses did you say that you testify that you searched on a day? Four to six?

A. No. If we do one shift, which is at noontime, we usually search four buses, three to four buses.

Q. But there's an earlier shift at 5:00 in the morning?

A. Right. And we don't always come at 5 a.m. in the morning. If we come at 5 a.m. in the morning—if it's a ten-hour day, we work five to three. That day we would do the buses at 5 a.m. and we would do the noon buses.

Q. And would you still search four at noon, if you had searched the buses at 5 a.m.?

A. Unless we got into something else, yes. It's not every day, but yes.

Q. How many buses do you search at 5 a.m. when you do search?

A. Maybe three.

Q. So if you run a type of shift that you're searching at 5:00 and at noon, you're going to search six or seven buses a day?

A. Yes, sir.

Q. And if you don't search at 5 a.m., you're only searching [50] four buses a day?

A. Right.

Q. And how many days a week do you do this?

A. Five days a week—four days a week.

Q. Four days a week?

A. Four to five days a week, yes.

Q. Four to five days a week.

A. Not—well, it's not every day. Sometimes we do it four days. Sometime we're—I mean it differs—not every day. I can't say every day, because sometimes we work the airport and don't get a chance to get to the buses. But say generally three to four days a week.

Q. So if you search seven buses a day, four days a week, then that would be 28 buses for that week, and if you searched four buses for three days, it could be something less?

A. Yes.

Q. All right. And they have, on the average, 25 to 30 people?

A. Yes, sir. Sometime less.

Q. That varies. Sometimes there's more people on the bus?

A. Sometimes there's more. Sometimes there's less.

Q. And you've been doing this for three years, you say?

A. Yes, sir.

Q. And how many people can you remember now in the past year when you approached them and told them who you were and that [51] you were looking for guns and narcotics have told you, "I'm sorry, I don't want you to search me"?

A. I have to give you an estimate. Five or six people.

Q. Five or six people?

A. Yeah, not very many.

Q. And how many people, when you come down the row and start searching them, get up and get off of the bus?

A. That's every day. Somebody is always getting up and getting off the bus when we're coming down the aisle.

Q. Getting on and getting off?

A. When we're on the bus, they're getting up and getting off, the whole time.

Q. Now, when you approached Mr. Brown and Mr. Drayton, you told them who you were, you told them what you were looking for, did you tell them that they didn't have to consent to your search?

A. No, I didn't.

Q. Do you ever tell people that they can refuse?

A. I have told people that they have an opportunity to refuse, yes, but I didn't that particular day, no.

Q. When you tell people that they can refuse a search, how do you phrase that? What do you say?

A. I give the same speech in reference to what I am doing, but at the end I would probably say, "You do have a right to refuse, but I would like for your cooperation," something [52] similar to that.

Q. Okay. Say anything about cooperation to Mr. Brown or anything about cooperation to Mr. Drayton?

A. Yes, sir, I did.

Q. What did you say?

A. Pretty much I introduced them who I was, saying, "I'm Investigator Lang out of Tallahassee Police Department. We're conducting bus interdiction, make sure there's no weapons or drugs on the bus." I said, "We would like for your cooperation. Do you have any luggage on the bus?" And they both pointed above their head.

Q. What was it about Mr. Drayton in particular that made you think he might have a weapon on him?

A. I was actually—at the time my attention was pretty much on Mr. Brown because he was the more—he was more communicative toward myself. And Mr. Brown was being real quiet. He had on a jacket. He wasn't saying a whole lot. He was just sitting there being very quiet, and he had on a big jacket and had on somewhat some baggy type pants. But at the time when my talking, I was talking to Mr. Brown. And Mr. Drayton was just sitting there. He wasn't doing a whole lot of talking. Mr. Brown was.

Q. Did you have any reason to believe that Mr. Drayton was armed?

A. At the time I was focused on Mr. Brown.

[53] Q. I understand that, but I'm just asking you about Mr. Drayton. You asked him if he had any guns on him, could you search. What was it made you think Mr. Drayton had a gun on him?

A. The way he was dressed as far as his clothing and all, I just inquired in reference to the way he was dressed as far as his coat and his pants.

Q. And this happened on February 4th?

A. Yes.

Q. Mr. Drayton is on a northbound bus?

A. Yes.

Q. For where?

A. Illinois or Indiana, somewhere up where it's very cold.

Q. Someplace where it's very cold?

A. Yes.

MR. CLARK: That's all the questions I have of Mr. Lang.

THE COURT: All right. Mr. Blow?

MR. BLOW: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. BLOW:

Q. Officer Lang, when you approached these two gentlemen on the bus, you did not do so because you had probable cause at that point in time to arrest them, did you?

A. No.

[54] Q. You did not at that time have probable cause to search them; did you?

A. No.

Q. You did not at that time have any reasonable suspicion upon which to base an arrest or a search; did you?

A. No.

Q. So the sole basis for your search of these individuals was their consent?

A. Yes, sir.

Q. Now, you've been a police officer for over 13 years. During that time you've had any number of training programs; have you not?

A. Yes, sir.

Q. You've completed the basic recruit training and a number of other courses, correct?

A. Correct.

Q. You understand the importance, do you not, sir, of writing police reports?

A. Yes, sir.

Q. And it's important that those reports be completely accurate and truthful?

A. Yes, sir.

Q. It is important that they be complete, correct?

A. I understand that.

Q. Now I'm asking you, isn't that correct?

[55] A. Yes, sir.

Q. And you wrote a report in this case, correct?

A. (Nods affirmatively)

Q. Now, before we go further, let me show you what's been tendered to be the subject of your earlier testimony today as to the report in this matter, and look it over and tell me if that is in fact your report and if it's a complete report.

(Pause)

A. Yes, sir.

Q. Now, you also indicated earlier this morning that you have read the memorandum prepared by the government in this matter where it asserts certain facts and so forth, and it was true and correct and accurate, correct?

A. Yes, sir.

Q. When you boarded the bus on February the 4th of this year, Investigator Blackburn went to the back of the bus first, correct?

A. Yes.

Q. All right. And he made contact with the person on the back seat of the bus?

A. Yes, sir.

Q. Describe that person for us again.

A. I think it was a white male.

Q. But you're sure that it was Investigator Blackburn that did that?

[56] A. Yes, sir.

Q. And did you have any interaction with that passenger?

A. The one directly in front of him I did, yes.

Q. No, sir, I'm talking about the one on the back of the bus.

A. Yes. We were both standing there at the same time, yes.

Q. Did you talk to him?

A. No, sir.

Q. Did you search his bag?

A. No, sir, I didn't.

Q. Well, then you—your police report where you indicate that—and I'll read it to you verbatim. "We proceeded to the rear of the bus and began making contacts with passengers. I spoke with the rear passenger reference his luggage and obtained consent."

A. Yes, sir.

Q. Now did you speak with him and obtain consent for the search of that rear passenger?

A. That might seem contradictory, but I spoke with the rear passenger, as well as he did. Both passengers at the back seat of the bus are in the rear, so that's the reason I said it that way. I didn't say, "on the seat next to the rear." I said "seat in the rear," which I did speak to the one right next to the bathroom in the rear of the bus.

Q. If I understood you earlier, you were telling us you spoke to the one in front of him. Now you're telling us there are [57] two on the back seat?

A. No. If this is the bench on the very back seat of the bus, this is the aisle. This is where—this is one seat where somebody is seating and this is another seat where somebody is seating. Drayton and Brown were sitting about right here. This is the bathroom right

here and there's a seat right here. We're at the back of the bus. He's standing here. He's talking to this gentleman and I'm talking to this one. This is at the rear of the bus.

Q. So the gentleman you were speaking to was not the rear passenger on the bus; is that correct?

THE COURT: Well, if this is done for my benefit, I understand it.

MR. BLOW: Thank you, Your Honor.

THE COURT: I think I understand.

BY MR. BLOW:

Q. When you write these reports—well, back up. When you investigate a crime, you may have other people who are witnesses to what took place; is that correct?

A. Yes, sir.

Q. As well as officers who may have been witnesses?

A. Yes, sir.

Q. And it is always an appropriate process to find out, to get the names and addresses and so forth of those witnesses; is it not?

[58] A. Not on the bus.

Q. I didn't ask about on the bus. I'm talking about people who are potential witnesses.

A. Yes, sir.

Q. Because those people are people that can come in and verify what it is that some other witness has to say, correct?

A. Correct.

Q. Or come in and contradict what someone else has to say about what took place.

A. Correct.

Q. And for instance, in a bus situation like this, people in the adjacent aisles or adjacent seats might be able to shed some light on what the processes were that took place that day, weren't they? Couldn't they?

A. Yes.

Q. And of course you know that; don't you?

A. Yes, sir, I could have.

Q. And you know that because you've been doing this a long time?

A. Correct.

Q. And so you make a choice, a deliberate choice as an officer, however, not to get the names and addresses of those potential witnesses; isn't that correct?

A. No, that's not correct.

Q. All right. If you didn't make the choice, who did?

[59] A. The fact that it just didn't happen. It wasn't a choice that I need to get their name. On that bus people don't like giving out their name and don't like giving out information in reference to what they're doing. So I don't want to inconvenience them at that time.

Q. These are the same people you talked about being so cooperative and so happy to have the police on there, that y'all are doing this, these are the same people that don't want to give you their name and tell you where they live?

A. I didn't say they don't want to give me their name. I said that we don't want to inconvenience them, because that adds into us spending more time on the bus. And people, they'll talk to you, yes, but if I get into asking them their name, then they're more reluctant for me to talk to them about whatever I'm talking to them about.

Q. Beyond the ones where you're making a cursory check, once you've actually made an arrest, as in the people in the adjacent seats. Obviously you made arrests. They saw you handcuffing two guys and take them off the bus, right?

A. Right.

Q. So how much longer would it have taken you to then ask the people in front, behind and to the side for their names and addresses because they're potential witnesses?

A. It wouldn't take me that long.

Q. Now, you indicated that Investigator Hoover was at the [60] front of the bus, and I believe you indicated that he was kneeling in the driver's seat; is that correct?

A. That's correct.

Q. Kneeling with his arms on the back of the seat watching passengers; is that correct?

A. Yes, sir.

Q. And you distinguish between kneeling in that seat and sitting in that seat?

A. Kneeling, sitting, usually one of the two. He's there in that seat, kneeling or sitting.

Q. So what you're talking about then when you say he was kneeling on the seat is what part of the process is as opposed to what you specifically remember about that particular day?

A. Kneeling.

Q. All right. So it's your testimony under oath today that on February 4th, he was kneeling in that seat?

A. That's my testimony.

Q. And you have adopted the statement of Mr. Simpson as being truthful and accurate, correct?

A. Yes, sir.

Q. Including wherein on Page 3 it represents that Investigator Hoover was sitting in the driver's seat?

A. He was kneeling in the driver's seat. My mistake.

Q. Assuming he was in fact kneeling in the driver's seat, the function of the Investigator Hoover is to watch the people on [61] the bus?

A. Yes.

Q. And what is he looking for when he's watching the people on the bus?

A. He's just observing reactions of the people, and he's looking for our safety, my safety, from the front.

Q. When you say observing their reactions, now, if I am seated on the bus and I am—got my hands down below the seat, he can't see my hands, right?

A. Right.

Q. So he is observing primarily either gross body movement, whether I get up or move about, or facial expression; is that correct?

A. He's observing passengers, reactions to whatever they do, hand movement, face reactions, sudden movements, period. He's observing them.

Q. And he can see those passengers seated on that bus?

A. From where he's seated, yes, he can see the ones that he needs to see.

Q. The view of Investigator Hoover from that seat is unimpeded, correct? He's got a clear view of everybody on the bus?

A. Not of everybody, but the ones—where I am, he's got a clear view of me, that he can observe and the people around me.

Q. You and the people around you?

[62] A. Yes.

Q. Including the people sitting there that you're talking to?

A. The ones that I'm talking to, yes, he has a clear view.

Q. Now, when you asked Mr. Brown for consent to search his person, you indicated to him, did you not, sir, that the purpose in wanting to search his person was for a weapon; isn't that true?

A. I said weapons and drugs.

Q. Didn't you ask him just for consent to search for a weapon?

A. I don't recall. Could I take a look at my report?

Q. Would you answer the question first?

A. I said I don't recall.

Q. Well, then what you prepared in your report on the same day of that arrest, February the 4th, 1999, would then be an accurate recitation of the events?

A. Yes, sir.

Q. That was when your memory was fresh about what took place?

A. Yes, sir.

(Pause)

Q. Ask the record to reflect I'm showing the officer his police report.

THE COURT: Yes, sir.

THE WITNESS: Okay.

BY MR. BLOW:

[63] Q. Now in the report that you wrote immediately after this arrest, that you've agreed that that was accurate, you indicated in there that, "I asked for permission to check their person for weapons." Period.

A. Uh-huh.

Q. That is correct, that is what your report reflected, and that is in fact what took place; is it not?

A. That is correct.

Q. So at that point—well, strike that. So you asked for limited authority to search for a weapon?

A. Uh-huh.

Q. Now, you have found drugs concealed, as you found them in this case, on any number of prior

occasions, 30 or more prior occasions you've recited, correct?

A. Yes, sir.

Q. And when you've felt this object on either side of the groin in Mr. Brown's pants, you immediately suspected you had found some more drugs; didn't you?

A. Yes, sir, I did.

Q. You weren't seriously concerned about whether this was a sawed off shotgun or something stuck in his pants; were you?

A. I knew it wasn't him, and I knew it was a possible weapon, so—

Q. Well, officer, are you trying to tell us that at that point you did not suspect it was drugs?

[64] A. No, I didn't say that.

Q. So you did in fact suspect you had found yet another—No. 31 or whatever—drug courier on a bus?

A. Yes, sir.

Q. And when you asked them for authority to check their persons for a weapon, you did not tell them that they had the right to consent—or a right to refuse; did you?

A. No, sir, I didn't.

Q. You did not tell them they had the right to get up and leave the bus; did you?

A. No, sir, I didn't.

Q. When you asked them—when you explained why you were there, and asked for their cooperation, you did not stop and ask for an answer to cooperation; did you?

A. I was given, immediate.

Q. What you have told us earlier is that you explained your purpose, asked for their cooperation and asked if you could search their persons?

A. Uh-huh.

Q. Is that correct?

A. That's correct.

Q. You went straight in from one end to the other. There was never a question, "Will you cooperate?" was there, sir?

A. No, sir.

Q. So you expressed your desire to have their cooperation and [65] then immediately ask, May I search your person, or search your bags?

A. I was immediately given permission.

Q. You asked the question first; didn't you?

A. Yes. And I was immediately given permission.

Q. Now, at this point in time Blackburn had come up from the back of the bus, was in fact standing next to you; was he not?

A. Yes, sir.

Q. So he was not still at the rear of the bus as you testified earlier?

A. I said—you know at this time he came up because I asked for him to.

THE COURT: How many passenger rows were there from the—

THE WITNESS: Three. I mean you're talking from —if I may show you, this is the rear of the bus—

THE COURT: That's what, is that the bench seat or not?

THE WITNESS: Yes, this is the bench seat. Say this would be where the bench seat would start. It would be like this, and the seat would be right here. Blackburn is usually standing right here in front of the bathroom, and I was standing right here. (Indicating)

BY MR. BLOW:

Q. When you patted down Mr. Brown and detected something in [66] his groin area, you did not ask him what it was?

A. No, I didn't.

Q. And the next thing you did was ask Mr. Brown, quote, did he mind standing up for you, end quote?

A. Yes.

Q. And he stood up?

A. Yes, sir.

Q. He didn't say anything, he just stood up?

A. Yes, sir.

Q. Do you have photos of these packages?

A. No, I don't.

Q. They were not photographed?

A. Yes, they were photographed. Yes, they are photographed.

Q. Now, you indicated that you have occasion when people do refuse to allow you to search, correct?

A. Correct.

Q. I think you indicated about one a week?

A. Some—yes, I guess I could say one every—

Q. There's nothing—there is nothing about that fact, the fact that some people do occasionally refuse, that is communicated to the passengers on this bus; is there?

A. No, it's not.

Q. So these passengers have no way of knowing that in fact once a week somebody does refuse and presumably nothing happens to them?

[67] A. No, it doesn't. I didn't.

Q. And thus, the overwhelming number of passengers therefore consent?

A. The majority of them consent, yes, sir.

Q. After you patted down Mr. Brown's groin and you detected something in his groin area, you did not ask him what it was, you asked him to stand up, you didn't explain to him why your suspicions were aroused at that point; did you?

A. No, I didn't.

Q. You did not give him an opportunity to allay your suspicions?

A. No.

Q. Or to decide at that point whether he had had enough of this and no longer wished to cooperate?

A. No, I didn't.

Q. Now you have indicated to us that, in fact, on occasion you do tell people they don't have to consent, correct?

A. Yes, sir.

Q. So there is nothing that prevents you from doing that?

A. No, sir.

Q. It doesn't impose any additional burden on you to do that; does it?

A. No.

Q. It doesn't delay the bus any longer?

A. No.

[68] Q. In fact, what would it take, three seconds, five seconds to tell people that?

A. Whatever you say, three to five seconds.

Q. And in fact the reason that you as a general rule prefer not to do that is because you want people to think they have to cooperate with you?

A. No.

Q. You want them to feel compelled, under those circumstances, on that cramped bus, to do what you want them to do?

A. That's not true. That's the reason I ask.

Q. You indicated earlier in response to a question by Mr. Simpson that the people on the bus are not confrontational with you, correct?

A. Right.

Q. Be a fair assertion, would it not, sir, that it doesn't pay to be confrontational with the police; does it? It's not healthy; is it?

A. It doesn't work for everybody.

Q. Police officers don't take well to being—to confrontational people; do they?

A. I take well to confrontations.

Q. Do the passengers on that bus have any way of knowing that?

A. Through the ones that I talk to, yes.

[69] Q. Do the rest of those passengers have any way of knowing—how do they know from talking to you that if they get confrontational with you and tell you, "I don't want to cooperate, it's none of your business, get out of my face," how are you going to react to that?

A. I say, "Fine." Usually when someone does not want to be searched, or having a bad day, or they don't want to be bothered, usually they are some confrontational when they say, "No, you're not going to search my stuff."

I just say, "Fine," and then I go on about my business.

Q. But the passengers on that bus that day have no way in the world of knowing what your prior experience has been?

A. No.

Q. So when you approach these people on the bus, you show them your badge, correct?

A. Correct.

Q. And that's so that they will know that you are the authority?

A. Yes.

Q. All right. You tell them what it is you want to do?

A. I tell them who I am, what I am doing.

Q. Yes. You identify yourself as an agent?

A. Yes, sir.

Q. And you announce to them, you tell those folks, "I'm on here, I'm checking for drugs," or whatever, "I want your [70] cooperation." You announce your purpose, right?

A. Very politely.

Q. Well, I appreciate that it's politely, but the fact of the matter is, you tell them what it is you want?

A. I tell them who I am and what I am doing. And then I ask for cooperation.

Q. And that is what you want, correct? You want their cooperation?

A. Yes, I want their cooperation.

Q. Because without their cooperation, you got no right to search them?

A. Exactly.

Q. And assuming they're going to cooperate with them, you tell them what you want to do, you want to search their bags?

A. Yes.

Q. And then you proceed to ask them, "Do you have a bag?"

A. Yes.

Q. And fortunately for conducting these type searches, what you've described earlier as the overwhelming majority of these people in fact believe they have a duty to cooperate and are cooperative with you?

A. Yeah. Most of those people, I mean, don't have a problem with cooperating because they feel—

Q. You don't know how they feel, you just know that they cooperate, right?

[71] MR. SIMPSON: Your Honor, I would ask the witness be allowed to finish his questions. Mr. Blow is asking compound questions and jumping in when the officer is midway through answering.

THE COURT: I think he can handle it, but let's see if we can get this record clear here. So let him finish, and Mr. Lang, let him finish his question before—let's back up. And did you say everything you wanted to say?

THE WITNESS: No, sir. What I was about to say, when people are—when they ask or when I ask them for cooperation, they usually give their cooperation with complimentary answers saying that they're glad for me to—for the police to be on the bus checking for drugs and weapons because it makes them feel safe on their trips, and they're glad to see that this is happening. They're not confrontational about it. And the ones that don't want to be bothered, don't want to be bothered, they say so, and we continue and move on.

BY MR. BLOW:

Q. But you agree with me, do you not, sir, that what you've described as the overwhelming majority of these people feel it is their duty to cooperate with you and therefore cooperate?

A. Willingly, yes.

MR. BLOW: No further questions, Your Honor.

THE COURT: Any rebuttal questions, Mr. Simpson?

REDIRECT EXAMINATION

[72] BY MR. SIMPSON:

Q. Mr. Lang, do you in any fashion tell people that they have a duty to cooperate?

A. No.

Q. Tell them that they're required to cooperate?

A. No, sir, I do not. I ask with politeness and kindness, hoping for their general appearance to cooperate with me on their own.

Q. And generally people do?

A. And generally people do, with no objections.

Q. Mr. Blow at one point asked you about searching the defendant's groin areas. Were you searching the area, the male private parts?

A. No, sir.

Q. Were you searching an area where weapons could be concealed?

A. Yes, sir, I was.

Q. Have you on occasions found weapons concealed on bus passengers?

A. Yes, sir, I have.

Q. Did you go any further than you would have needed to gone to check for weapons?

A. No, I didn't.

Q. Now, you talked about—were asked about Mr. Hoover's observations from the front of the bus. Are there occasions [73] when Mr. Hoover reports to you that somebody is reacting obviously to your presence?

A. Yes, sir.

Q. Does that tend to focus your attention on that person?

A. Yes, sir.

Q. And make him one of the persons that you will contact on that bus?

A. Yes, sir.

Q. Do you happen to remember how many seats there are on the bus, how many passenger seats?

A. Forty-seven. The majority of them are 47, and now they have some 55.

Q. And let me ask you, the fact that you did not get the names and addresses of passengers in the same area of the bus, were you trying to cover up anything, hide anything?

A. No, sir.

Q. Were there any of those people that would have been able to give you any additional information about whether these men were actually carrying cocaine in their underwear?

A. No, sir.

Q. And I think one of the attorneys started out asking you a question phrased in terms of what you were doing or how you proceeded when you confronted the defendants. Did you see this as a confrontation?

A. No, I didn't.

[74] Q. Any raised voices?

A. No, sir.

Q. Any threats?

A. No.

Q. Any orders?

A. No.

Q. Any physical address?

A. No, sir.

MR. SIMPSON: No further questions.

THE COURT: Let me ask you, Mr. Lang. This bus was coming up from South Florida.

THE WITNESS: Yes, sir.

THE COURT: Do you know whether—which passengers are through passengers? In other words, I guess when they pull into Tallahassee for—obviously for those people who are going only to Tallahassee, they get off the bus, claim whatever checked luggage they have and leave?

THE WITNESS: Yes, sir.

THE COURT: And the ones who are going through to whatever the next stops may be would get off, I guess go in and use the—as you say, maybe take a smoke or go in the terminal, or do whatever, make a phone call, go to the bathroom, get a bite to eat, until the bus is ready to depart.

THE WITNESS: Yes, sir.

THE COURT: Are you able to distinguish which ones are [75] through passengers and which ones are—are the ones that boarded—got on the bus for the first time in Tallahassee?

THE WITNESS: The way it works, sir, usually we arrive at the bus station around 12:45—I mean 11:45, correction. And buses started coming in at 11:45, the ones from out of town. We're in an area to observe people get off the bus and watch them. They usually—if they get off the bus, they stand there on the outside, if they're coming to Tallahassee, until they retrieve

their luggage. They either go inside and make a call for a cab, or either they walk straight down to the west side of the building and wait for a cab there.

The other ones, everybody have to go inside of the bus terminal before they're supposed to reboard the bus, or either you go to—

THE COURT: Does the bus require them to get off the bus?

THE WITNESS: Yes, sir, everybody is required to get off the bus.

THE COURT: Is that a bus company regulation and not something of Tallahassee Police Department, or—

THE WITNESS: No, that's bus company policy. When they get in Tallahassee, they refuel the buses, they mop the buses, sweep them out and change the toilet.

THE COURT: Is that 5:00 in the morning or noon? Doesn't make any difference?

[76] THE WITNESS: Doesn't make any difference. Tallahassee is the hub. When they get to Tallahassee, all buses are swept out, mopped and they put in—they make sure they get all the trash off the bus and change all that.

THE COURT: What happens to the overhead luggage?

THE WITNESS: If you're going to stay on that bus because you're going —

THE COURT: On further?

THE WITNESS: On further, you can leave it on the bus, or you have people that take it off the bus. And usually when you get off the bus, the driver will give

you an additional tag that you're going to stay on this bus, and it means that you can retrieve your seat before everybody else.

THE COURT: That's your boarding pass to get back on, right?

THE WITNESS: Yes, sir. And the ones that don't have a boarding pass, they have a ticket where they're starting in Tallahassee to get on the bus.

THE COURT: So you're watching until the bus driver tells you he's got everybody on board?

THE WITNESS: Yes, sir.

THE COURT: On this particular occasion?

THE WITNESS: Yes, sir.

THE COURT: Did you have anybody targeted or anything like that?

[77] THE WITNESS: No, sir. I just observed them because of what they were wearing, and the weather wasn't that cold in Tallahassee at the time.

THE COURT: And your understanding this bus was going on up to the Midwest somewhere?

THE WITNESS: Yes, sir, I understood that. But I mean the weather was to a point where it was uncomfortable to wear that type of clothing here in Tallahassee. I mean, you would have either taken it and put it in your hand.

THE COURT: But you yourself had on kind of a—

THE WITNESS: Big shirt or jacket. That's to conceal my weapon.

THE COURT: So what was then unusual about them having a jacket on or something like that, if you were wearing one?

THE WITNESS: Mine was somewhat of a light shirt, just a shirt, which is not insulated, like a leather jacket that he had on. And the other guy had on a bigger jacket.

THE COURT: I, of course, heard your testimony from the questions that were asked by the lawyers. As I understand it, once you got Mr. Brown and Mr. Drayton off the bus, then there was no more questioning. You were all off the bus; is that right?

THE WITNESS: Yes, sir, we were off the bus.

THE COURT: And if there had been somebody else on the bus that might be carrying contraband, they got a pass go out [78] of Tallahassee; is that right?

THE WITNESS: That's right. There is only three of us, and usually—sometime if the bus is not—if the bus driver—like if we get on the bus and find someone with drugs right away or something, I will usually pass them up to Investigator Hoover, and if the bus driver isn't standing there, then we'll go ahead and check one or two other people, but if so, then we just get off the bus and take what we got.

THE COURT: Do you prefer black or African American?

THE WITNESS: Doesn't matter.

THE COURT: All right. Does the fact that you and Mr. Brown and Mr. Drayton were of the same racial makeup, would your attitude or approach to them be any different than it would to, say, a white person,

whether male or female, or an Hispanic person, either male or female?

THE WITNESS: No, sir. As a matter of fact, when I'm checking people on the bus, I make it a point to talk to a white male, black male so it would not seem as if I'm picking on one particular race. I make it a point to talk to people on the bus in that general so it won't be that way.

THE COURT: So you were asked about the procedure that you use. What do you do with females? I don't know the other two officers involved. I take it they're both males; is that right?

THE WITNESS: Yes, sir.

[79] THE COURT: What do you do when you have a suspicious female, or somebody who hands you over a bag and it's got something in it, or some skinny female wearing clothes that are obviously many times her size and that might make you suspicious, or carrying a handbag that makes you suspicious?

THE WITNESS: I approach females the same way in reference to where they're coming from. If they have luggage in the immediate area, or concealed close by them, I give them the same—I go through the same spiel as far as identifying myself and ask them and tell they what I am doing. I ask can I check their luggage, being if it's a purse or a bag.

THE COURT: But you wouldn't be patting the breast area or the—

THE WITNESS: No, sir.

THE COURT:—or the lower abdomen of a female?

THE WITNESS: No, sir. If it's a jacket or something that will arouse my suspicion, I mean, pulling the jacket away from her body and shaking pockets is nothing out of the ordinary, but, no, I don't physically check females that way.

THE COURT: Now when you got on that bus that day, you, Mr. Hoover or Mr. Blackburn, did you all walk on with your badges up and say, "Hey, folks, we're from Tallahassee Police Department. We want to make sure that your travel on this interstate carrier is safe and secure, so we're going to work this vehicle from the back of the bus forward and we want your [80] cooperation?" Anything like that?

THE WITNESS: No, sir. We boarded the bus just like we were passengers, with the exception of Investigator Hoover seating himself in the front seat, and proceeded to the back. As a matter of fact, on our way back on some buses—not this particular day, but people still are getting up and walking to and from the bus, or either still putting up packages sometimes. We try to wait until they put up everything so we can walk freely without anybody being in the way.

THE COURT: As far as you know, was everybody who was going to leave Tallahassee on that bus already on board?

THE WITNESS: As far as I know, yes, sir.

THE COURT: Was it—did you get some indication from the driver, or did he button up the bus or what?

THE WITNESS: The way that happens is after everybody that was in the line, which was inside of the terminal, get on the bus, and he take all of the tickets, he usually is up front writing something on the pad. He'll step down off the bus, he'll look at us and say, "It's

all yours." He'll walk into this other room and process some paper, or document how many passengers he has or call—

THE COURT: Is that what happened that day; do you recall?

THE WITNESS: Yes, sir, pretty much. After he got through taking the tickets, everybody was on the bus seated.

[81] THE COURT: Do you recall whether they announce it on the loudspeaking system in there, bus for Montgomery, or Birmingham, or Nashville, or wherever it goes from here to get to the Midwest?

THE WITNESS: They announce it at the beginning, before he start taking tickets.

THE COURT: And that's the call to people to get on the bus, either through passengers to get back on, or the new passengers to get ready to surrender their tickets?

THE WITNESS: Yes, sir. They will say, at this particular time we'll be boarding passengers for this particular bus, and then they'll go through a list of cities where it's going to be going.

THE COURT: Now, do you ask the people for their tickets?

THE WITNESS: No, sir, I don't.

THE COURT: Do you ask them for any kind of identification?

THE WITNESS: No, sir.

THE COURT: Do you ask them for a name?

THE WITNESS: No, sir.

THE COURT: You merely—your badge, does it have your name on it, or just a number?

THE WITNESS: Just the city—well, the State of Florida, City of Tallahassee.

[82] THE COURT: It's a badge and not a police I.D. or anything?

THE WITNESS: No, it's a badge.

THE COURT: And all you just say, I'm—do you give your name or anything?

THE WITNESS: Yes, sir, I usually—my spiel is usually, when I board the bus—

THE COURT: Tell me what you did this time.

THE WITNESS: When I got to them, I said, "Hi, I'm Investigator Lang. I'm Tallahassee Police Department. We're attempting to deter illegal contraband or drugs or weapons from being transported on the bus." I said, "I would like for your cooperation," something similar to that. "Do you have any luggage on the bus?" And they pointed up.

And I said, "Do you mind if I check your bag for weapons or drugs?"

And he said—Mr. Brown said, "Okay."

And I took the bag and I handed it to Investigator Blackburn, and I went from there back to Mr. Brown in reference to a weapons check, and that's when he opened up his coat, pointing—he opened up his coat, took out his cell phone and opened his—turned around toward me with his jacket open, and I went from there.

THE COURT: Okay. And when you took them off the bus, you mentioned that you had them handcuffed

one at a time, I [83] guess. Blackburn take Mr. Brown off, or was it Hoover?

THE WITNESS: Hoover took Mr. Brown off.

THE COURT: And you took off—

THE WITNESS: Mr. Drayton.

THE COURT: Was there any big commotion in the aisles or anything?

THE WITNESS: No, sir. It was just—to be honest with you, sir, it was calm—I mean, it was real calm. It was nice. Nobody said anything. People were looking. Nobody—there was no confrontation between myself, Mr. Drayton, Mr. Brown. I actually felt real good about the way it happened. They gave me no confrontation about nothing that was said. They was very cooperative. As a matter of fact, they were almost too cooperative, if you ask me.

THE COURT: Was there any announcement to the people on the bus or anything like that? Did you say anything as you were leaving?

THE WITNESS: No, sir. I just escorted them off the bus.

THE COURT: How much after that, if you know, when the bus left?

THE WITNESS: I don't even know. I was out in the back parking lot. I retrieved their luggage from underneath the bus, because they had luggage underneath the bus.

THE COURT: You mean checked luggage?

[84] THE WITNESS: Yes, sir. Retrieved their checked luggage from underneath the bus, and we got

that, and they gave him his ticket back, I think, and they left.

THE COURT: Counsel, have any additional questions on anything I may have asked that wasn't already covered? If not, then Mr. Lang, you can step down.

MR. BLOW: I do, I was waiting on Mike.

RECROSS EXAMINATION

BY MR. BLOW:

Q. Investigator Lang, you were talking about your suspicions being aroused because they had jackets on on the bus, correct?

A. Yes, sir.

Q. Now, as we sit here in this courtroom today, it's got to be 70 or better degrees in here, correct?

A. Yes, sir.

Q. And as these defendants sit here today, one is sitting at the table with an insulated nylon jacket on, and the other is sitting here with a long-sleeved sweater on; is he not?

A. Yes, sir.

Q. You wouldn't find that unusual; would you?

A. Somewhat his jacket I do, because it's not like more of a suit type. Personally I do.

Q. You find simply the fact that he's sitting here with a jacket on suspicious?

A. No.

[85] Q. And the fact that it's somewhat cool outside this morning might justify him having his jacket; might it not?

A. Yes.

Q. And the fact that riding on a bus, particularly if you're seated next to the window, where the air conditioning is blowing out, it might get cold on that bus; mightn't it?

A. Yes, sir.

Q. Especially if you sit there for a long period of time?

A. Yes, sir.

Q. Might very well be a real good reason to have a jacket on irrespective of what the temperature is outside, right?

A. Yeah.

Q. So in and of itself, that's nothing suspicious, correct?

A. It was suspicious to me.

Q. But absolutely explainable?

MR. SIMPSON: Objection, argumentative. And, Judge, we're not claiming there was probable cause or reasonable suspicion. This is a consent search.

THE COURT: Proceed.

MR. BLOW: Your Honor, I wish to tender into the record as a defendant's exhibit this matter of the police report that he's previously identified and we've used to cross-examine him on.

MR. SIMPSON: No objection.

THE COURT: It's received, Defendant's Exhibit 1.

[86] (Defendant Exhibit No. 1 received in evidence.)

BY MR. BLOW:

Q. Do you have a specific recollection today of whether you had your badge in your hand versus the badge on the neck chain?

A. No, I don't.

Q. So it is quite possible that you had your neck chain on that day as opposed to a badge in your hand?

A. Yes, sir.

Q. Either way, it was clear to the people on the bus that you were law enforcement officers?

A. To the—yeah, to the ones that I was talking to at that time, yes.

Q. And all of you have your identification, your badges, right?

A. Yes, we do.

Q. And although you did not get on the bus and make—as you described—or as the judge described it—hold your badge up and make a general announcement to the bus, as you approached each seating area, you did make an announcement, if you will, a general announcement to the people in that row of seats of what your purpose was?

A. I spoke directly to that particular gentleman. He knew who I was talking to. It wasn't an announcement, no.

Q. There's two people seated in the row of seats, correct?

A. Correct.

[87] Q. And when you approached those two people, you identified yourself as a law enforcement officer, correct?

A. Correct.

Q. You showed your authority, your badge?

A. Correct.

Q. All right. You identified yourself by your authority, correct?

A. Correct.

Q. You told them what it was you wanted?

MR. SIMPSON: Your Honor, I object. This is repetitious. This is argumentative, and among other things I've got a jury selection with another court at 1:00. And I expect Your Honor to take a reasonable time to handle this, but I don't have time for Mr. Blow to make his closing argument as he repeats the questions he's asked before.

THE COURT: Try again, Mr. Blow.

BY MR. BLOW:

Q. You tell the people seated there what it is you want, correct?

A. Yes.

Q. And you tell them—you then proceed to tell them what you're going to do, you ask them if they have bags?

MR. SIMPSON: Objection, Your Honor. This is precisely the same question that Mr. Blow went into at the conclusion of his last series of questions, and it's well [88] beyond any direct that the government asked.

THE COURT: Sustained.

MR. BLOW: No further questions.

THE COURT: Any questions, Mr. Clark?

MR. CLARK: No, Your Honor.

THE COURT: How about you, Mr. Simpson?

MR. SIMPSON: No, Your Honor.

THE COURT: Any further evidence?

MR. SIMPSON: None from the government.

THE COURT: How about from the defendants?

MR. BLOW: May we have just a moment to confer, Your Honor?

THE COURT: We'll just stand down for just a second. No recess, we'll just be at ease for a minute.

(At ease)

THE COURT: All right. Please be seated, everyone. The government announced it has no further witnesses. What say the defendants?

MR. BLOW: None for Defendant Brown.

MR. CLARK: No further witnesses, Your Honor.

THE COURT: Anybody care to be heard briefly?

MR. SIMPSON: Briefly, Your Honor.

THE COURT: Do I just run the instant replay?

MR. SIMPSON: The Supreme Court said there are no per se rules, you look at the totality of the circumstances. [89] If you look at the totality of the circumstances here, there is no coercion. There is an identification with a badge. I will disagree with Mr. Blow that it is a show of force or a show of authority, but the officer certainly makes sure that the people he's talking to knows he's a cop, tells them he would like their cooperation, and when asked politely, they cooperate, and the Supreme Court says that's fine.

THE COURT: All right.

MR. CLARK: I'll try to be as brief as Mr. Simpson. Usually—

THE COURT: We're all going to miss lunch then.

MR. CLARK: Usually I don't have any problem. But as the court knows, the Supreme Court has held in Florida vs. Bostick that bus searches are not, per se, unconstitutional, but the Eleventh Circuit, as well as the Supreme Court, found it significant that in Bostick, the officers did tell Mr. Bostick in that case that he had a right to refuse the consent to their search. Also, it found significant that they did not threaten him with any sort of gun.

But the court did say that the fact that he was on a bus was a factor that could be taken into consideration by the courts. And in Guapi, and in the United States vs. Washington, which are both Eleventh Circuit cases, the Eleventh Circuit has considered just that matter, the fact that these were bus searches that were—these were searches that were on buses, [90] that the people on these—in these two cases, Mr. Guapi and Mr. Washington were not threatened in any way by the police by weapons, but also that in both of the cases Guapi and Washington, they were not advised that they had a right to refuse to consent to the search, and the Eleventh Circuit found in both of those cases that the resulting searches were unconstitutional and threw out the evidence that was seized in the case.

I think it's very significant and the court should take note that Mr. Simpson's response to our motion, on Page 12 of his response, he said that probably the best evidence of the coercive nature of these tactics came from the officer himself, who searched 28 or more buses

—and I believe he's referring to Guapi in this statement —he searched 28 or more buses each week, and could remember only a few times when the passengers had refused to consent to the search.

Well using Mr. Simpson's own words, we can refer to Mr. Lang's testimony today, Your Honor, where he said that he searched four to seven buses a day, sometimes four to five times a week, with an average of 25 to 30 people on the bus. So if I want to do the math and use four buses a day, and disregard the additional three, because that's going to probably factor out in the average, four buses a day, times five days a week, times 52 weeks a year, results in 1,040 buses that Mr. Lang and Mr. Hoover and Mr. Blackburn have searched. [91] Now with 25 people on each bus, on average, and the fact that Mr. Lang has been doing this for about three years, he has had the opportunity to interact, if you will, with 78,000 people, of which he says he can remember five or six people who refused. So five or six people out of 78,000 is less than one 100th of one percent. In fact one 100th of one percent would be 7.8 people. So he's even—that's a very, very minute number of people have taken the opportunity to say, "I'm sorry, Mr. Lang, I don't want you to search me."

In the other Eleventh Circuit cases that Mr. Simpson cites, United States vs. Fields and United States vs. Hammock, in both of those cases, the Eleventh Circuit upheld bus searches. But it's also significant in those two cases, the Eleventh Circuit found that the officers had advised the passengers that they had a right to refuse.

In Washington and in Guapi, the police have appeared in uniform, they've appeared out of uniform. They've made announcements from the front of the bus.

They've started their searches from the front of the bus, they've started the searches from the back of the bus.

The only difference we have in Washington and our case today is the fact that Mr. Lang, instead of making an announcement to the general populous on the bus that he was from Tallahassee Police Department, addressed each person individually. And as he said, he was talking just loud enough [92] for that particular person to hear what he was saying. So it should come as no surprise that when he leans over Mr. Drayton and announces that he's Officer Lang with the Tallahassee Police Department and shows a badge, that's a show of force—or show of authority rather, and he has probably surprised Mr. Drayton, since Mr. Lang has testified nobody else could hear what he was saying except the person he was talking to.

And Your Honor, I would suggest that when a person is addressed that suddenly by a law enforcement officer, he has even less time to reflect on what he's going to do than if the officers make an announcement from the front of the bus.

I would say that this case is not unlike Washington. It's not unlike Guapi. The Eleventh Circuit has made it fairly clear that they're going to insist that police officers tell the passengers they have a right to refuse the search or they're going to find the searches illegal. And I think you should do the same thing.

THE COURT: Mr. Blow?

MR. BLOW: Your Honor, I would like to start as far as the legal analysis with Bostick in the United States Supreme Court. We have heard and it has been characterized as saying that there is no per se rule that

someone must be told they have a right to refuse to consent. And you may recall when we had a detention hearing, and there was some brief interchange about this, and how the Eleventh Circuit could seem to adopt [93] such a per se rule.

I have subsequently gone back and looked at Bostick, and Bostick does not so hold, I submit to the court. I submit that what Bostick holds number one, you got to remember the fact of the Florida Supreme Court.

THE COURT: The Eleventh Circuit says that's what it says, at least the majority in Washington said that's what it says.

MR. BLOW: What Bostick dealt with out of the Florida Supreme Court was a decision of the Florida Supreme Court saying that when you get on the bus in this fashion, that that constitutes a seizure, that act constitutes a seizure. Reading from Bostick, the Supreme Court said that the Florida Supreme Court—talking about the argument made by the defendant—found this argument persuasive, so much so that it adopted a per se rule prohibiting the police from randomly boarding buses as a means of drug interdiction, a per se rule against boarding the buses.

The state court—Florida Supreme Court that is—erred, however, in focusing on whether Bostick was free to leave rather than on the principle that those were intended to capture.

So the Florida Supreme Court went too far because they said we're just going to say all of such bus stops are in fact seizures, and that then places an almost impossible burden on [94] the government. And that is the problem with the Florida Supreme Court's rationale when it got up to the U.S. Supreme Court.

The U.S. Supreme Court does not say in that opinion that we are ruling out any possible per se requirements of telling them they have the right to consent. It doesn't get to that. It never addresses it. It says that the crucial test is whether, taking into account all the circumstances surrounding the encounter, the police conduct would have communicated to a reasonable person that he is not at liberty to ignore the police presence and go about his business. That's not a new standard. That's basically been the standard in what are described as consensual type encounters.

So I just want to get to that issue first. And notably, the Supreme Court did not decide any of the facts in Bostick, as to whether in fact it was consensual or not. They refrained from doing that.

THE COURT: Well, let's see. And you stopped your quote, but the next paragraph, seems to me—

MR. BLOW: Next paragraph or next sentence, Judge?

THE COURT: The next paragraph. "For example, the mere fact that Bostick did not feel free to leave the bus does not mean that the police seized him. Bostick was a passenger on a bus that was scheduled to depart. He would not have felt free to leave the bus even if the police had not been present. [95] Bostick's movements were 'confined'"—and that word is in quotes—"in a sense, but this was the natural result of his decision to take the bus." It says nothing about whether or not the police conduct at issue was coercive.

MR. BLOW: We're not reading from the same place, Judge. I'm reading in the paragraph that has numeral 4 beside it, starting on—

THE COURT: I'm reading from U.S. Supreme Court Reporter.

MR. BLOW: Should be—

THE COURT: You had read—

MR. BLOW: Should be at Page 437 of the opinion, where I was reading.

THE COURT: I'm reading from 436.

MR. BLOW: In any event, we are in agreement that we remain with the totality of the circumstances, and that whether it's on a bus is a valid circumstance that can be taken into consideration. We then go from there to the Eleventh Circuit, which says that this is not only a circumstance, it is a significant circumstance because it is a coercive environment.

The Eleventh Circuit in Guapi—

THE COURT: I think they found in Guapi and Washington—at least in Washington, two of the three judges felt that way.

MR. BLOW: When you get to Washington—let me [96] address first Washington. Of course Washington, I think, involves the agent who gets on the bus and holds his badge up and basically says what we're here for, which I understand is a different fact than we have here in this case.

The government has tried to draw that distinction, but if you—on Page 1357, the paragraph that should have brackets 2 and 3 behind it—they talk about what the officer, Officer Perkins, in that case did. He held up his badge, he identified himself as an agent. He announced what he wanted to do. He announced what he was going to do.

And the court said, absent some other indication to bus passengers that they didn't have to cooperate, they did not have to consent, that we find under these circumstances most people aren't going to feel that they are free to ignore that. And I quote from the opinion that, "Most citizens, we hope, believe that it is their duty to cooperate with the police.

And indeed the Eleventh Circuit's observation has been borne out by the facts in the instant case because the officer has testified, and Mr. Simpson has testified, that the overwhelming number of people do in fact cooperate and consent. The percentage that my colleague has given you—

THE COURT: And I take it that's from the math department at Georgia Tech.

MR. CLARK: She helps, Your Honor.

MR. BLOW: I haven't done the numbers, but I'll rely [97] on it as being accurate as alleged.

It is overwhelming, certainly statistically significant, that the vast majority of people do, under these circumstances. The officer has testified that he had no other legitimate reason to detain these people, a factor noted in Washington; that he could have told the people they had a right to consent, it would have taken only a matter of three to five seconds; that he has in fact done that in the past and that there was no reason for him not to have done it this time.

I will not try to tell the court that I have done an exhaustive research of the Eleventh Circuit, but based on the citations that I have found, and that Mr. Simpson has pointed to, I find one bus case affirmed by the Eleventh Circuit. That's United States vs. Fields, and the significant thing about that case, as in Bostick, is

that they told him he had the right not to consent. He had the right to refuse.

Now—

THE COURT: Of course Fields was decided before Bostick, right?

MR. BLOW: Well, it was decided in '90. Bostick was decided in '91, decided June of '91. Appeal was decided August of '90.

THE COURT: I was looking at the numbering on the report.

MR. BLOW: So the—certainly I think the argument is [98] that the Eleventh Circuit, the approach they took pre-Bostick and the approach they've taken post-Bostick has not varied substantially.

It is a coercive environment that you put a person into, that a reasonable person—the Eleventh Circuit has already found that a reasonable person on a bus in that fashion—that that's a coercive environment, and that most people are in fact going to cooperate. So the simple fact that someone does is not in and of itself controlling. It's to be expected.

The officer in this case identifies himself. He shows his badge, his authority. Either it's hanging around his neck or he flashes it in his hands. He tells them what he's there for and what he wants to do. He asks for their cooperation, but doesn't give them a chance to answer, and goes straight into, "Do you have any bags?" And then, "May I search them?"

And then one thing goes from there to the other. The officers are on the bus. He wants to talk about the front of the bus and the back of the bus. They start their search from the back. They've learned. Some of

the earlier cases that got reversed they started at the front. So they started at the back, but they put an officer up at the front. His explanation, his rationale is that that officer is there to observe the passengers and to protect him. Fine. That may well be his subjective rationale. But for the passengers on the bus, there's an officer in the back, there's an officer up [99] there at the front. My—I'm restricted. I don't know—what am I going to do here?

He wants to give you the impression that this officer's presence—because he's in the seat, they're free to leave and so forth, or—and in fact I think indicated that the people can't necessarily see him. But the fact of the matter is—

THE COURT: But this was nobody in a blue uniform standing there with an AK-47 or anything like that. And—

MR. BLOW: It was an officer with a badge.

THE COURT:—and knock me out of the way if you can, Mr. Passenger, and get off of the bus. There's none of that, Mr. Blow.

MR. BLOW: I don't think that's required, Judge. He's an officer with a badge. That badge conveys authority to the vast majority—

THE COURT: Is there any testimony whether he was brandishing a badge, or who in the heck he was?

MR. BLOW: Officer Lang testified they all had their badges out, either in their hands or hanging around their neck, he didn't remember which, but they all had their badges.

THE COURT: I'm sure they had them on their person.

MR. BLOW: But the officer is up front where he can see the passengers, the passengers can see him. Kind of like these little bumper stickers you see on the side of the tractor-trailer rigs that say, "If you can't see my mirrors, I [100] can't see you in my mirrors." Well the same thing. If he can see them, he can make eye contact. Lang said he's watching facial reactions. Then the people whose faces he's watching can watch him.

THE COURT: The only testimony I heard here was that when they got on, they got on right with the passengers, so that they could have been mistaken for other passengers. I don't know any—there's no evidence to the contrary. They're in civilian clothes. And whether they had it around their—on a chain or in their hands, those little wallet fold-up things, I guess with a badge.

MR. BLOW: With all due respect—

THE COURT: Unlike some of these other cases—go ahead.

MR. BLOW: In response to your question, the officer said that the bus driver finished up his manifest and so forth, stepped off the bus and then said, "It's all yours." All right, so the passengers were already on and seated. The bus driver had gotten his tickets or whatever he was going to do. So they weren't getting on with the rest of the passengers. The bus driver who has been on the bus gets off the bus. Three men with badges get on the bus.

Again, we're back to the situation that the Eleventh Circuit has cited, again, that under these circumstances in this type of an environment, that it is to be expected that [101] most people are going to feel they have a duty to cooperate. The officer agreed that most of

these people felt they had a duty to cooperate and did in fact cooperate.

But that's the problem, because most people, or reasonable people, are going to be expected to feel that way, there is an obligation, a burden, when you get into this kind of environment to then go a step further, and that obligation is to make sure they understand, if you're going to do it in that type of environment, that they have the right to refuse, or the right not to consent, and that there will be no cost for that.

Now there may not be a cost. Maybe they do in fact let people walk off, or refuse, I don't know. I'll take his word for it. But the fact of the matter is, the people on the buses don't know that. All they know is we've got three officers that have gotten on the bus, they're flashing badges at me. I can't go anywhere. That's a course of environment that the Eleventh Circuit has repeatedly rejected. And the only time they haven't rejected it was when the defendant was affirmatively told he had a right to refuse.

THE COURT: Anything?

MR. SIMPSON: Your Honor, what Mr. Blow fails to recognize is that both Guapi and Washington refer to the specific circumstances of those cases where there is a general announcement, a show of authority. And I'm not going to read you what's quoted in our opposition and what is in the cases [102] that I know Your Honor has looked at. They specifically and repeatedly say, there is no per se rule, but once you've made a general announcement and once you've given the show of authority, then there needs to be some positive indication they can decline.

That isn't what happened here. There wasn't any—and Your Honor will have to judge for yourself, but there isn't a show of authority. What there is is the officer identifies himself, and probably you can gather from the rest of his testimony he puts people at ease by letting people know that he's okay, he's not a threatening person.

The only two factors in this case which defendants can point to which in any way support the suggestion that there was some coercion here, or some duress here, or something other than total voluntarily, is one, it's on a bus, and two, they were not explicitly advised they had the right to refuse consent.

Well, the Supreme Court in Bostick said that there's no per se rules on a bus. The Supreme Court in Schneckloth vs. Bustamonte said, you don't have to—per se have to advise them that they have the right to refuse. The lesson of those cases, the lesson of the Eleventh Circuit cases and the other Supreme Court is, you look at the totality of the circumstances, and when you look at the totality of the circumstances, this is as benign a contact as you can imagine.

[103] If anything, Officer Lang, you may think he's a real slick guy and you wouldn't want him around a young lady you were interested in, but this is a matter of him being so friendly that people want to help him, and presenting himself in such an amiable fashion that people go along with it. And Guapi distinguished its own facts from facts very much like this when it said, it is not unusual to be approached by a fellow traveler on a bus or in an airport, and therefore there is no reason to believe that when police officers engage in similar behavior that they are coercing or intimidating citizens.

And it distinguishes its own facts, the same cannot be said for a uniformed person at the front of a Greyhound.

This case the not Guapi. This is not Washington. Your Honor is required to assess the totality of the circumstances, and the totality of the circumstances tell you, this is friendly contact. This isn't overbearing. This isn't threats, this isn't a display of weapons.

The phrase "duty to cooperate." Mr. Blow said four or five times in compound questions until he finally got at least part of the question agreed to, where Officer Lang said he didn't do anything to suggest there was a duty to cooperate. He said, "I would like cooperation." And lo and behold, the people cooperated. He made a reasonable request and people responded. And the court says, "That's fine." And that's where we are.

[104] THE COURT: All right. In this case I find that there was no violation of the defendant's constitutional rights, and that the police conduct was not coercive and that the search was therefore voluntary on the part of the Defendants Brown and Drayton. And I base that upon my consideration of the totality of the circumstances, and of course having heard the only witness in this case testify.

I don't think the facts are much in dispute. It's very clear that the bus was traveling from south to north through Tallahassee going somewhere either north or west, perhaps both, out of Tallahassee. This was a stop along the way. The passengers were required to exit the bus by the bus company. And then after the passengers got back on board—that is those who were continuing on their travels and those who were boarding new in Tallahassee boarded—then the three

officers, Mr. Lang, Mr. Hoover and Mr. Blackburn, boarded the bus.

Again, Hoover apparently at the front, then kneeling, as I guess I can—on his knees, in the driver's seat, looking aft, to check and make sure that there was no threat to the officers whose backs were turned. Mr. Blackburn goes to the back of the bus and—to check the restroom and the passenger on that rear bench seat.

Mr. Lang, who testified, starts working the bus from the back forward. In the—I guess what might be the first full row of seats, the defendants, Mr. Brown and Mr. Drayton, were [105] seated. The badge was either pulled out from his chain around his neck or handed to him by Mr. Lang. He was walking forward and leaning over from the rear of the passengers, rather than standing in the aisle blocking their way.

There was no general announcement when these officers got on the bus. There was no brandishing of the badges by these officers when they boarded the bus. They came on and they could have or could not have been—and I don't think it makes any difference—but easily could have been distinguished or indistinguishable from other passengers who may have boarded late. But whatever, they were the last ones on the bus.

And as in Bostick, the people who were on that bus were on there because they wanted to be on that bus. They were going someplace from Tallahassee. It was not as if the police or the bus company herded them, did a sweep through the lobby of the terminal and put everybody on the bus and then let the police come on board and work the bus. These people were on because they wanted to be on the bus.

So if, as in the words of Florida against Bostick—the Supreme Court case, 501 U.S. 429, decided June 20, 1991—Mr. Brown and Mr. Drayton were in no different position than Bostick was, who was on that bus, and the bus was ready to leave. So we start from that premise. They were on that bus, they were in that confined location by their choice.

The officer—Investigator Lang did not tell him, and he [106] does not make that suggestion here, nor does the government, that he was required—he does not tell them that they don't have to consent.

And I think that's what Bostick says, at least that's what the Court of Appeals of the Eleventh Circuit, Judge Roney, who wrote both of these opinions for the majority, says: "Although we reject the notion of a per se rule requiring bus passengers to be informed of their constitutional rights"—and then it goes on say, we have to—except for the use of the word "police officers" in Guapi, and the use of the word "federal agents" in Washington, that paragraph of Judge Roney's opinion is identical. It contains the same language. It came out of the same word processor, and well it should because that's how—that's, I guess, a correct statement of the law.

And so we are then—whatever we may think about that rubric, whatever we may think that it might be easier on these cases if the police had taken the three to five seconds say, "Now of course you folks don't have to consent, it's entirely up to you," there's nothing in the law that says they have to do that. So we look at the totality of the circumstances.

This is an officer who approaches these men from the back. There is no one standing in their way. He is

coming to them from their rear. He leans over—and it's obvious that they can get up and leave, as can the people ahead of them. If his speech is as it was on the stand, there is nothing in his tone [107] of voice that suggests that this is some abusive bully type individual. He is a black or African American man talking to two other black—black or African American men on this bus. He leans forward, and either from his chest chain or from his wallet shows them his badge and explains to them that he wants to—as his testimony was, that he's concerned about drugs and firearms.

And everything that's said, everything that took place between Officer Lang and Mr. Drayton and Mr. Brown suggests that it was cooperative. There was nothing coercive, there was nothing confrontational about it. There is no evidence that there was somebody then standing in the aisle and say, you know, come if you want to.

And so none of the circumstances that existed in Guapi, G-U-A-P-I, U.S. against Guapi, 144 F.3d 1393, decided by the Eleventh Circuit on June 29, 1998—that's 144 F.3d 1393—nor in U.S. against Washington, decided by the same Eleventh Circuit, 151 F.3d, 1354—that's 151 F.3d 1354—decided by the Court of Appeals on August 28th, 1990, nothing in either—this case is unlike both of those cases.

Here there was no general announcement. Here there was nobody standing at the front of bus. Here the passengers were already on, ready to leave. There was nothing coercive and nothing in what Officer Lang said or did or the other officers did on that bus that would suggest to a reasonable person that [108] they were not free to leave.

And so they're handing over their luggage, their on-board luggage. Their consent to the pat down leads me, as I've indicated, to believe that there was no violation of their constitutional rights. They consented to this search. I find that the government has met its burden on this case. I think that the government's response on Pages 16 and 17 fairly well sets forth the facts and the law that applies to the facts in this case.

Therefore, the evidence was lawfully seized by the police, and therefore the—and would be admitted in a trial of this case. And the motion to suppress is denied as to both defendants. And if upon reflection I need to put anything more on the record concerning my basis for this, I would allow myself to do so, but I think I've fairly well stated the basis for my decision.

Yes, sir.

MR. BLOW: Your Honor, if I may, based on the police report that was given to us during the recess, after the officer testified on direct, it indicates that he asked for consent to search for a weapon. I would seek to expand my objections to the search on this basis, that they exceeded the scope of the consent given by searching—then having him search for drugs and so forth.

MR. SIMPSON: And the response to that is the officer [109] didn't look anyplace a weapon couldn't be concealed and didn't go any further in the search than would be necessary to find a weapon, by the testimony you heard.

THE COURT: If that's the basis, I think the officer's testimony was that—and maybe in response to a direct question that you asked him, Mr. Blow, down there when you felt that hard object, and—I think somebody

followed up with a question, it wasn't like a body part, like the scrotum or anything like that, he said, yes, they found drugs and weapons down there, and that's a place to hide them.

So if that is the point of that objection, and if indeed he said that he was looking for weapons and alas found drugs, or was looking for drugs and a weapon appears in a place, that does not vitiate that search. It does not make that evidence of contraband inadmissible and does not alter my findings in this case.

So the motions to suppress are respectively denied and the—this matter at trial will—the evidence will be received in evidence.

All right, anything further? When is this case set for trial, Mr.—

MR. SIMPSON: 13th of April, I believe.

DEPUTY CLERK: Yes, sir.

THE COURT: All right. Anything further?

MR. SIMPSON: No, sir.

[110] THE COURT: Court is adjourned.

(Proceedings concluded at 12:05 p.m.)

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I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

_____ _____

LISA GIROD JONES, RPR, RMR
Official Court Reporter

Date

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

4:99CR15-WS

THE UNITED STATES OF AMERICA, PLAINTIFF

v.

CHRISTOPHER DRAYTON, DEFENDANT

TRANSCRIPT OF TRIAL

BEFORE THE HONORABLE WILLIAM STAFFORD
SENIOR UNITED STATES DISTRICT JUDGE AND
A JURY

APPEARANCES:

For the Plaintiff: P. MICHAEL PATTERSON
U.S. Attorney
By: MICHAEL T. SIMPSON
Assistant U.S. Attorney

* * * * *

For the Defendant RANDOLPH P. MURRELL
Federal Public Defender
BY: WILLIAM R. CLARK
Assistant Federal Public Defender

* * * * *

[10] RUFUS R. LANG, GOVERNMENT WITNESS, DULY SWORN.

DIRECT EXAMINATION

BY MR. SIMPSON:

Q. How are you employed, Mr. Lang?

A. Police investigator with the Tallahassee Police Department.

Q. What is your current assignment through the police department?

A. I'm currently assigned as a narcotic interdiction investigator with the narcotics unit.

[11] Q. How long have you been in narcotics?

A. Approximately ten or 11 years.

Q. How long have you been with the police department as a whole?

A. Thirteen years.

Q. Were you working for the police department back on the 4th of February of this year?

A. Yes, I was.

Q. And did you have occasion to go to the Greyhound bus station that day?

A. Yes, I did.

Q. We're talking about the facility just a couple blocks north of here?

A. Yes.

Q. And would that be involving a drug interdiction program?

A. Yes, it would.

Q. Please take a few minutes and tell the ladies and gentlemen of the jury what the drug interdiction program is and how y'all operate.

A. There's three investigators, myself and two of my coworkers, and one of the guys have the drug dog.

What we do is go down to the bus station during the busiest times, where all the buses are coming to the bus station, and we sit around and observe people. We usually—we're looking for things out of the ordinary, people acting out of character. We basically [12] check the major source cities, places like Miami, and source cities coming from out of the west, like Houston or Texas, for marijuana, and from Miami we check for cocaine.

What we do is we observe passengers get on the bus, acting out of character. We board the bus, not hindering anybody from leaving or getting on and off the bus. We're very friendly. We make contact with people and not hinder them from getting on and off the bus. Friendly contacts, giving them—asking for their cooperation in reference to us talking with them. And we ask them reference to are they carrying any illegal contraband in or on the bus. And usually we get permission to check their luggage, or permission to have conversations with them, and we determine whether they have narcotics or drugs or alcohol, or weapons, while they're traveling on the bus. And we work the same way at the airport through verbal contact, consensual contacts. And that's pretty much the way we carry out our job through the day.

Q. Does the bus station know that the police department is conducting these checks?

A. Yes, they do.

Q. That's all right with the bus station?

A. Yes.

Q. Do you just pick on black people or Hispanic people, or do you—is—I guess the question is, is race one of the criteria that you use in deciding to talk to people?

[13] A. No, if you board the bus and if you're acting strange—we talk to anybody on the bus regardless of race, color. Basically we're on the bus for a short period of time and make contact with a few people on the bus, and if you agree to talk to us, we'll talk to you. If you don't, we don't.

Q. Let me ask you, are there occasions when you don't have any particular suspicious behavior but you still talk to people anyway?

A. Yes.

Q. And you talked about people from source cities. What if you get on the bus and find somebody that's from Tallahassee?

A. Usually we don't—we have talked to them, but we make it a practice not talking to them because it's originating right here in Tallahassee, and they're either leaving here or going somewhere else. We try to spend most of our time—which is brief—with people coming from source cities.

Q. How about somebody coming from Canada?

A. Yeah, we would talk to them too.

Q. And getting back to the 4th of—oh, how do you dress when you do these checks?

A. We dress casual, jeans, T shirts, flannel shirts.

Q. Okay.

A. Just plain clothes.

Q. Do you carry a weapon?

A. Yes, I do.

[14] Q. Is your weapon visible so that someone would know it was there?

A. No. We have on—like if I have on jeans or a shirt, I usually wear a flannel shirt that's bigger than the shirt I have on, that covers up my weapon, where you can't see it when I board the bus. It's out of their view. And I have a badge, usually around my neck, or I have it in my hand.

Q. Now let's go back to the 4th of February of this year. When you first caught sight—did there come a time that day when you saw Mr. Drayton and Mr. Brown?

A. Yes, I did.

Q. And when you first saw them, were they on a bus or not on a bus, or what was going on?

A. I observed them inside the terminal and I observed them again when they boarded the bus.

Q. About what time of day is this?

A. Noon time, around noon.

Q. Was there anything about them that caught your attention?

A. Yes, at the time it was not very cold, and they were wearing what I—to my attention I thought was pretty warm clothes for the time, for the weather that particular day, rather.

Q. Was there anything about their trousers?

A. Yes, their pants were very baggy, loosely fitting on their person.

[15] Q. Why did that catch your attention?

A. Because it's a normal way people, when they're trying to conceal something on their body, you can easily hide it with baggy clothes.

Q. And I'm sorry, I believe you said you saw them get on a bus?

A. Yes, I did.

Q. And could you tell from what's posted on the bus or otherwise where that bus was going?

A. Yes, it was headed up north—it was headed to Detroit is where it had the final destination, but it was headed up north.

Q. What did you do?

A. We boarded the bus, myself and Investigator Blackburn and Investigator Hoover. We proceeded to the very back of the bus.

Q. Does anybody not go to the back of the bus?

A. No, we always proceed to the very back. Investigator Hoover stops at the front, and he's observing people from the outside, just for our safety, while we're on the bus, out of the aisle and out of the way of everybody.

Q. So just you and Mr. Blackburn go to the back?

A. Yes.

Q. What happens?

A. We proceed to the very back of the bus and we make contact with the very first person at the very rear of the bus, we make contact with that person. And while we're on the bus we try to [16] put a piece of luggage with everybody that's on the bus. Meaning that by simply asking, sir, is this your luggage above your head, or so forth. Investigator Blackburn spoke with the last passenger on the bus. I stood kind of out of the way and waited until he was finished. At that

point in time, I proceeded to work my way back up the bus by making contact with the passengers.

Q. Do you recall whether you spoke to anyone before you got to Mr. Brown and Mr. Drayton?

A. Yes, I did.

Q. Tell us about that.

A. I spoke with a passenger—if I'm not mistaken, if not directly behind to the right of—I spoke with a passenger and asked them did they have any luggage above their head. He said yes. I asked if he mind if I checked it. He gave me permission to check it. I didn't find any contraband in reference to where I was hunting. And before I asked, I also—you know I have my badge in my hand, and I lean over to him and tell him, "I'm Investigator Lang with the Tallahassee Police Department. We are conducting bus interdictions making sure there's no guns, weapons, drugs or alcohol on the bus. We would like for your cooperation." And then I will further say, "Do you have anything like that on the bus?" And people say no or yes, or no or yes, whether they'll talk to us or not.

Q. Do you ever have people that don't want to talk to you?

[17] A. Yes, I've had people to refuse.

Q. What happens to them?

A. Just tell them have a nice day, and I continue to work my way down the aisles.

Q. Did you ever have people that when they hear you talking about the police department get up and get off the bus?

A. Yes, we've had people get up and walk off the bus.

Q. What do you do then?

A. Just let them go, walk off the bus. We've had people get up, when they hear me mention what I'm doing, they walk off the bus. But my attention is not directly focused at them. If they wanted to get off, they was free to get off.

Q. After you check this other passenger's luggage, what happened then?

A. I proceeded to Mr. Brown and Mr. Drayton.

Q. Do you recall which one was on—are they beside each other, across the aisle, or how are they set up?

A. Seated right next to each other on the driver's side and close to the rear of the back of the bus. Mr. Brown is sitting next to the window, and Mr. Drayton is sitting in the aisle.

Q. Do you see either of those people here in the courtroom today?

A. Yes.

Q. Which one?

A. Mr. Drayton.

[18] Q. And would you describe how he's dressed and where he's seated?

A. He's seated in between the two white males. He's the black male sitting in between them at the table.

Q. Now, what happens when you—first of all, do you get all the way up even with Drayton and Brown, or how do you approach them?

A. Approached them from the rear of the seat so that I'm not blocking the aisle if they wanted to get up and walk out.

Q. What do you say to them?

A. I explain to them who I was with my badge, inform them what I was doing, and I ask if they have any luggage on the bus.

Q. How did they react when you asked them that?

A. Both Mr. Brown and Mr. Drayton both anxiously pointed above their head to the luggage that they had, to the luggage above their head.

Q. Talking one piece or more than one piece?

A. It was one piece of luggage.

Q. Both of them?

A. Yes.

Q. What happened after that he identified it?

A. I asked could I search the bag, and Mr. Brown—well they both—Mr. Brown nodded yes.

Q. What did you do then?

[19] A. I took the bag from above, and I handed it back to Investigator Blackburn who was standing behind me. And at this point in time I turned back around to Mr. Brown and asked if he minded if I checked his person for weapons. And at the time that I asked him, he said sure, and he opened up his jacket and he began taking things out of his pocket. He took a cell phone out and other things out of his pocket. And I reached over and asked him if he mind if I patted him down. I began to pat him down from up here around the waist. And I got to this area around his waist—

Q. If you could for a moment, if you'll stand aside from the witness stand so the jury can see what you're doing with your hands, and show them how you patted down?

A. I started in the waist area and I patted right to here, about right along in here, and I felt two unknown objects—well several unknown objects that I knew wasn't part of his anatomy.

Q. You're holding your indications on the front part of the thigh?

A. Yes, right here.

Q. About the length where your hands would naturally fall if you let them hang from your shoulders?

A. Yes.

Q. You can resume your seat on the witness stand. Now, are you having to reach across Mr. Drayton to pat down Mr. Brown?

[20] A. Yes, I was.

Q. What happens when you finally finished?

A. I asked Mr. Brown to stand up. And he stood up and turned his back to me. And I asked him to step out in the aisle. And when he stood up in the aisle, Investigator Hoover, I motioned for him to come and take Mr. Brown off the bus.

Q. And do I assume correctly that Mr. Brown is arrested at that point?

A. Yes.

Q. What do you do with Mr. Drayton?

A. I turned to Mr. Drayton and I asked him if I may check his person also, and he gave me permission, yes, and I checked his person the same way as I checked Mr. Brown. And when I got into the same area, I felt an unknown object on him also. So I asked him to stand up, and I placed him under arrest at that time.

* * * * *

[28] Q. How many people are on these buses that you see on an average basis?

A. Excuse me, you mean passengers on the bus?

Q. Passengers, yeah.

A. It varies from—anywhere from six to 47.

* * * * *

[31] [Q.] * * * How many of those people, Officer Lang, last year, told you they didn't want to be searched?

A. Six or seven at the most.

Q. Out of 18,000?

A. If you want to say—if I talked to 18,000. I see a lot of people, but I wouldn't say I talk to 18,000.

Q. You don't talk to everybody, you only talk to certain people?

A. Exactly.

Q. And Mr. Drayton was one of the people you talked to because he had loose clothing on?

A. Not necessarily true.

Q. Because he had loose clothing and a heavy jacket?

A. Yes.

Q. And this took place on February 4th?

A. Yes.

Q. And where was he going?

A. To Indiana.

Q. And what was the weather like February 4th in Indiana? Was it snowing?

A. I'm not aware what it was like in Indiana, but in Tallahassee it was kind of warm.

Q. Well, in February is the weather any different in Indianapolis than it is in Tallahassee?

A. Yes.

* * * * *

Supreme Court, U.S.
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No. 01-631

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

CHRISTOPHER DRAYTON AND CLIFTON BROWN, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether an officer who informs a passenger on a bus that the officer is conducting drug and illegal weapons interdiction and asks the passenger for consent to search, while another plainclothes officer stays at the front of the bus without blocking the exit, has effected a "seizure" of that passenger within the meaning of the Fourth Amendment and *Florida* v. *Bostick*, 501 U.S. 429 (1991).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 231 F.3d 787. The oral decision of the district court (Pet. App. 10a-14a; J.A. 129-134) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 24, 2000. Pet. App. 1a. A petition for rehearing was denied on May 16, 2001. Pet. App. 15a-16a. On August 1 and 31, 2001, Justice Kennedy extended the time within which to file the petition for a writ of certiorari to and including October 12, 2001. The petition was filed on October 12, 2001, and was granted on January 4, 2002. 122 S. Ct. 803. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the Constitution of the United States provides in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * * .

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Florida, respondent Christopher Drayton was convicted of conspiring to distribute cocaine, in violation of 21 U.S.C. 841(a)(1) and 846, and possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Following the entry of a conditional guilty plea in the same court, respondent Clifton Brown, Jr., was convicted of conspiring to distribute cocaine, in violation of 21 U.S.C. 841(a)(1) and 846. Drayton was sentenced to 120 months of imprisonment, to be followed by eight years of supervised release; Brown was sentenced to 88 months of imprisonment, to be followed by five years of supervised release. The court of appeals reversed and remanded with instructions to grant respondents' motions to suppress. Pet. App. 1a-9a.

1. On February 4, 1999, a Greyhound bus made a scheduled stop in Tallahassee, Florida, en route from Ft. Lauderdale, Florida, to Detroit, Michigan. Pet. App. 3a-4a. At the bus station in Tallahassee, all 25 to 30 passengers on board were required to get off the bus for reasons unrelated to law enforcement (so that the bus could be refueled and cleaned). Pet. App. 3a; J.A. 104 (Tr. 75-76). The driver checked the passengers' tickets as they re-boarded and then left to handle

paperwork inside the terminal. Pet. App. 3a; J.A. 77-79, 104 (Tr. 47-48, 75-76). Before the bus driver left for the terminal office, three members of the Tallahassee Police Department asked for and received the driver's permission to board the bus. The police officers were dressed casually, and each had his badge around his neck or in his hand. Although the officers were armed, their weapons were covered by their clothing, and there is no evidence that any passenger was aware that the officers were armed. Pet. App. 3a; J.A. 43-44, 76-77 (Tr. 11-12, 45-46).

The three officers boarded the bus. Officer Hoover remained at the front, kneeling in the bus driver's seat, facing toward the rear of the bus. From that position, he could see the passengers and ensure the safety of the other officers without blocking the aisle or otherwise obstructing the exit. Pet. App. 3a; J.A. 45-47, 89-90 (Tr. 12-15, 59-61). Officers Lang and Blackburn walked to the back of the bus, where Officer Lang began speaking with individual passengers.[1] Officer Lang politely asked passengers about their travel plans and attempted to match each passenger with luggage in the overhead racks. So that he would not block the aisle, Officer Lang stood next to or just behind the passenger with whom he was conversing. Pet. App. 3a; J.A. 47-50, 56 (Tr. 14-18, 24). According to Lang, any passenger

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[1] Officer Blackburn spoke with the passengers seated in the very last row; Officer Lang spoke with the other passengers. Officer Lang explained that the "primary purpose" of having Officers Hoover and Blackburn with him was safety. From the front of the bus, Lang explained, Officer Hoover would "observ[e] passengers' reactions to what [Lang] was doing for [Lang's] safety," and Blackburn was "doing the same" from "the back of the bus," *i.e.*, "observing the passengers while" Lang "ma[d]e contacts." J.A. 47 (Tr. 14-15).

who declined to have his luggage searched or who wished to leave the bus would have been permitted to do so without interference or argument. Pet. App. 3a-4a; J.A. 70-71, 98 (Tr. 39-40, 69). In Lang's experience, most people willingly cooperate, Pet. App. 4a, and some remark that they are glad the police are checking for drugs and weapons to ensure passenger safety during their travel, J.A. 73, 100 (Tr. 42, 71). Officer Lang could recall five to seven instances in the last year in which passengers had declined to have their luggage searched. In addition, it was very common for passengers to get up and leave the bus while the officers were on it. Pet. App. 4a; J.A. 81 (Tr. 50-51). See J.A. 95-96 (Tr. 66) (individuals declined to grant consent about once a week). Sometimes Officer Lang specifically told passengers that they had the right to refuse to cooperate, but on this particular day, he did not. J.A. 81 (Tr. 51).

Respondents were seated on the driver's side of the bus, near the back. Drayton was in the aisle seat and Brown was next to him, by the window. Officer Lang approached from the rear and leaned over Drayton's right shoulder. Speaking in a normal conversational tone, Officer Lang showed respondents his badge and explained his purpose. With his voice "just loud enough for [respondents] to hear," Lang said:

> I'm Investigator Lang with the Tallahassee Police Department. We're conducting bus interdiction, attempting to deter drugs and illegal weapons being transported on the bus. Do you have any bags on the bus?

Pet. App. 4a; J.A. 55 (Tr. 23-24). Respondents answered by pointing to a green bag in the overhead luggage rack. Lang asked, "Do you mind if I check it?"

and Brown replied, "Go ahead." Lang handed the bag to Officer Blackburn, who looked inside and found no contraband. Pet. App. 4a; J.A. 56, 59-61 (Tr. 24, 27-29).

Lang had noticed that respondents were wearing heavy jackets and baggy pants even though it was a warm day. Pet. App. 4a-5a; J.A. 61, 105 (Tr. 29-30, 77). Because Lang was aware that drug traffickers and others often use baggy clothing "to conceal weapons or narcotics on their person," J.A. 61 (Tr. 29-30), he asked Brown for permission to pat him down for weapons. Brown said "Sure," pulled a cell phone out of his pocket, and opened his coat. J.A. 61-62 (Tr. 30); see Pet. App. 5a. As Lang performed the pat-down, he felt hard objects on the fronts of Brown's thighs; the objects resembled drug packages that Lang had detected on other occasions. Pet. App. 5a; J.A. 63 (Tr. 31-32). When Lang felt the objects, Brown "just dropped his head," without saying anything. J.A. 64-65 (Tr. 33). Lang arrested Brown and handcuffed him; Officer Hoover then escorted Brown off the bus. Pet. App. 5a; J.A. 63-64 (Tr. 32-33).

Lang then turned to Drayton and asked, "Mind if I check you?" Drayton responded by lifting his hands approximately eight inches from his legs. Pet. App. 5a; J.A. 65 (Tr. 33-34). Lang conducted a similar patdown and found the same kind of hard objects on Drayton's thighs. Pet. App. 5a; J.A. 65 (Tr. 34). Lang then arrested Drayton and escorted him off the bus. Pet. App. 5a; J.A. 65 (Tr. 34). A search of respondents revealed that Brown had three packages taped to the several pairs of boxer shorts he was wearing; the packages contained a total of 483 grams of cocaine powder. Drayton was also wearing multiple pairs of boxer shorts. Those shorts had two packages, containing 295

grams of cocaine, taped to them. Pet. App. 5a; J.A. 66-67 (Tr. 35).

2. A federal grand jury returned a two-count indictment charging respondents with conspiring to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 846, and possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Gov't C.A. E.R. 12 (indictment). Respondents moved to suppress the cocaine. Relying on two Eleventh Circuit decisions that involved searches of bus passenger luggage, *United States* v. *Guapi*, 144 F.3d 1393 (1998), and *United States* v. *Washington*, 151 F.3d 1354 (1998), respondents argued that their consent to the pat-down was invalid because they "were not told they did not have to consent." See, *e.g.*, Drayton Motion to Suppress, C.A. E.R., Tab 2, at 2.

Following an evidentiary hearing and the arguments of counsel, the district court denied the motion. "[T]he police conduct," the district court found, "was not coercive and * * * the search was therefore voluntary." Pet. App. 10a; J.A. 129 (Tr. 104). The officers, the court found, did not brandish their badges or weapons when they boarded the bus. To the contrary, the court explained, the officers were dressed in street clothes and boarded around the same time as the passengers. As a result, the court found that the officers "could have been mistaken for other passengers." J.A. 126, 130 (Tr. 100, 105); Pet. App. 11a. Officer Lang, the court further noted, spoke to respondents from just behind their seats so that "no one [was] standing in their way." Pet. App. 13a; J.A. 131 (Tr. 106). It was "obvious," the court found, that respondents could "get up and leave, as [could] the people ahead of them." Pet. App. 13a; J.A. 132 (Tr. 106).

The district court also found that there was "nothing in [Officer Lang's] tone of voice" to suggest bullying or abuse. Pet. App. 13a; J.A. 132 (Tr. 106-107). To the contrary, after hearing the testimony and observing Officer Lang's temperament and demeanor, the court found:

> [E]verything that[] [was] said, everything that took place between Officer Lang and Mr. Drayton and Mr. Brown suggests it was cooperative. There was nothing coercive, there was nothing confrontational about it.

Pet. App. 13a; J.A. 132 (Tr. 107). See also J.A. 51, 58 (Tr. 19, 26) (officer's testimony that he speaks to passengers in a "friendly and courteous" manner, using "a nice tone of * * * voice").

The cases cited by respondents, the court further observed, were distinguishable. In those cases, the officers made a general announcement from the front of the bus. Such an announcement, the court noted, might have suggested to the passengers that they were not permitted to refuse cooperation. Here, in contrast, "[t]here was no general announcement when the[] officers got on the bus." Pet. App. 13a; J.A. 132 (Tr. 107). The court continued: "There was nothing coercive and nothing in what Officer Lang said or did or the other officers did on that bus that would suggest to a reasonable person that they were not free to leave." Pet. App. 13a; J.A. 132 (Tr. 107-108). Although the officers did not "tell [respondents] that they don't have to consent," the court noted, "there's nothing in the law that says they have to do that." Pet. App. 12a, 13a; J.A. 131 (Tr. 106).

3. The court of appeals reversed. Pet. App. 1a-9a. "This case," the court stated, "is controlled by our

decision in *United States* v. *Washington*, 151 F.3d 1354 (11th Cir. 1998), which extended *United States* v. *Guapi*, 144 F.3d 1393 (11th Cir. 1998)." Pet. App. 5a-6a. In *Guapi*, the bus driver advised the passengers that they were required to get off the bus. Before the passengers exited, however, two officers boarded the bus and announced to the passengers that they wanted the passengers' "consent and cooperation" in performing a quick inspection of luggage for contraband. After waiting for the passengers to open their bags, one officer proceeded down the aisle, checking the passengers' bags as he went. Because the officer started at the front, the passengers had to get by him to get off the bus. The court of appeals concluded that the show of authority at the front of the bus, combined with the other circumstances, would have communicated to passengers that they were not free to decline cooperation absent "notification to the passengers that they were in fact free to decline the search request." 144 F.3d at 1394-1396. In *Washington*, the officer again made a general announcement at the front of the bus, holding his badge over his head and declaring that his purpose was to conduct "a routine bus check." He then asked individual passengers for tickets and identification, and requested consent to search some passengers' bags. Following *Guapi*, the court declared that a bus passenger under those circumstances would not feel free to disregard the officers' requests absent "some positive indication that consent could have been refused." 151 F.3d at 1355-1357.

In this case, the court of appeals agreed that the police officers neither blocked the aisle nor made a general announcement suggesting that cooperation was required. Nonetheless, the court held that *Guapi* and *Washington* compelled the conclusion that respondents

had been seized and that their consent to search was involuntary. Like the officers in *Guapi* and *Washington*, the court stated, in this case Officer Lang began the encounter with a "show of authority" by displaying his badge in his hand and telling respondents that he was a police officer. Pet. App. 6a. The fact that Lang spoke to each passenger individually and used a quiet, friendly tone, the court stated, made no difference: "We do not believe that a passenger-specific show of authority is any less coercive than a general, bus-wide one." *Id.* at 7a. The court noted that the opinion in *Guapi* had distinguished between general announcements and individual officer-citizen interactions. *Id.* at 7a n.5. The panel in this case, however, deemed that distinction unpersuasive and dismissed it as dictum. *Ibid.*

The court also refused to distinguish this case from *Washington* and *Guapi* based on the fact that, in this case, the officer did not ask respondents for tickets or identification. Pet. App. 7a. Whether or not an officer asks for such documents, the court stated, does not affect whether other requests or commands are coercive. *Ibid.* Nor did it matter that passengers in other instances "had declined to have their luggage searched, and that passengers had often exited the bus while the officers were on it," the court stated. *Id.* at 8a. There was no evidence of what the officers said or did in those other cases, the court noted, and the number of times in which passengers had refused to consent to the search were few in comparison to the number encounters. *Ibid.* Finally, the court concluded that the presence of an officer in the bus driver's seat, at the front of the bus, could contribute to a finding that the passengers had been seized. The court did not dispute that Officer Hoover (like the other officers) was dressed in casual,

civilian clothes. It cited no evidence that any passenger knew that Hoover was a police officer. Nonetheless, the court declared that seeing Hoover near the bus exit "might make a reasonable person feel less free to leave the bus." *Id.* at 9a.

The court of appeals acknowledged that *Washington* had "been criticized by the Tenth Circuit" because it establishes a de facto requirement that officers warn bus passengers of their right to refuse cooperation. Pet. App. 2a n.2 (discussing *United States* v. *Broomfield*, 201 F.3d 1270 (10th Cir.), cert. denied, 531 U.S. 830 (2000)). The court also acknowledged that the Tenth Circuit had, for that reason, "declined to follow" *Washington*. *Ibid.* Nevertheless, the court deemed itself bound by *Washington* as in-circuit precedent. *Ibid.* The court of appeals denied the government's petition for rehearing en banc. Pet. App. 15a-16a.

INTRODUCTION AND SUMMARY OF ARGUMENT

When Officer Lang approached respondents on the Greyhound bus, he spoke to them individually and politely in a quiet voice, did not show a weapon or make intimidating movements, left the aisle free so that respondents could exit, and said nothing that would suggest that respondents were required to cooperate or were barred from leaving the bus. Pet. App. 3a-4a. The district court thus expressly found that "everything that took place between Officer Lang and Mr. Drayton and Mr. Brown suggests that it was cooperative"; that "[t]here was nothing coercive" or "confrontational" about the encounter; and that it was "obvious" that respondents could have left the bus at any time. Pet. App. 13a; J.A. 132 (Tr. 106-107). The court of appeals did not dispute those findings. Nonetheless, it held that respondents had been illegally seized and that

their consent to search was therefore invalid. Such an encounter cannot be considered consensual, the court of appeals stated, "without some positive indication" from the police officers that consent or cooperation "could have been refused." Pet. App. 6a (quoting *United States* v. *Washington*, 151 F.3d 1354 (11th Cir. 1998)).

A. That conclusion cannot be reconciled with this Court's cases. Because consensual encounters between the police and citizens implicate no Fourth Amendment interests, *Florida* v. *Bostick*, 501 U.S. 429, 434 (1991); *Florida* v. *Rodriguez*, 469 U.S. 1, 6 (1984) (per curiam), this Court repeatedly has recognized that the police may approach individuals, ask questions, and even request consent to search without violating the Fourth Amendment, "as long as the police do not convey a message that compliance with their requests is required," *Bostick*, 501 U.S. at 435. Thus, "mere police questioning does not constitute a seizure." *Id.* at 434; *INS* v. *Delgado*, 466 U.S. 210, 216 (1984) ("police questioning, by itself, is unlikely to result in a Fourth Amendment violation"). That is true whether the police-citizen interaction takes place in a public airport, *Florida* v. *Rodriguez*, *supra*, in a private building, *Delgado*, *supra*, or on an interstate bus, *Bostick*, *supra*. Here, there was no police conduct that "would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter," *Bostick*, 501 U.S. at 439, and nothing the police said or did created circumstances "so intimidating as to demonstrate that a reasonable person would have believed" cooperation to be mandatory, *Delgado*, 466 U.S. at 216. The officers showed no weapons; spoke politely and quietly with the passengers; and said nothing that might convey the message that cooperation was mandatory.

B. The court of appeals nonetheless held that a seizure had occurred because, when Officer Lang introduced himself to respondents, he showed respondents his badge and identified himself as a police officer—an action the court characterized as a "show of authority." Pet. App. 6a-7a. Contrary to the court of appeals' suggestion, introducing oneself to a citizen and showing a badge or other official form of identification does not by itself effect a seizure. Instead, it reassures the citizen that he is communicating with the police rather than a random or potentially threatening stranger. This Court, moreover, has consistently recognized that police officers do not effect a seizure or otherwise coerce citizens merely by approaching and identifying themselves as law enforcement officials. For example, the officers began the interactions at issue in *Delgado* and *Rodriguez* by identifying themselves as law enforcement officials. *Delgado*, 466 U.S. at 212-213; *Rodriguez*, 469 U.S. at 4, 6-7. Yet, in each of those cases, this Court held that the encounter was consensual.

C. By finding that self-identification is a "show of authority" that effects a seizure of bus passengers absent some "positive indication" that cooperation can be refused, the court of appeals effectively created a per se rule that officers must afford bus passengers *Miranda*-like warnings of their right to refuse consent before asking for permission to conduct a search. Police-citizen encounters almost uniformly begin with the officer identifying himself and explaining his purpose. Moreover, if the polite interactions at issue here are not consensual absent warnings of the right to refuse consent, there are few situations in which such warnings would not be necessary. This Court has repeatedly rejected the use of per se rules in determining the reasonableness of a law enforcement official's

conduct under the Fourth Amendment. *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973). Seizure determinations must be made in light of the "totality of the circumstances." *Bostick*, 501 U.S. at 437. Those circumstances show that the police-citizen encounter at issue here was not a seizure but rather a consensual interaction.

ARGUMENT

THE INTERACTION BETWEEN OFFICER LANG AND RESPONDENTS WAS CONSENSUAL

A. An Officer's Encounter With A Citizen On A Bus Does Not Implicate The Fourth Amendment If A Reasonable Person Would Feel That It Is Permissible To Decline The Encounter

In *Terry* v. *Ohio*, 392 U.S. 1, 19 n.16 (1968), this Court noted that "not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." As long as a reasonable person would feel free "to disregard the police and go about his business," *California* v. *Hodari D.*, 499 U.S. 621, 628 (1991), the encounter is purely consensual and outside the confines of the Fourth Amendment. "Unless the circumstances of the encounter are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded, one cannot say that the questioning resulted in a detention under the Fourth Amendment." *INS* v. *Delgado*, 466 U.S. 210, 216 (1984).

In a variety of settings, this Court has held that law enforcement officers may, consistent with the Fourth Amendment, approach individuals whom they have no

reason to suspect of wrongdoing and ask them questions, *Florida* v. *Rodriguez*, 469 U.S. 1, 5-6 (1984) (per curiam); *United States* v. *Mendenhall*, 446 U.S. 544, 557-558 (1980); ask to see their identification, *Florida* v. *Royer*, 460 U.S. 491, 501 (1983) (plurality opinion); and request consent to search, *Royer*, 460 U.S. at 501 (plurality opinion); *Rodriguez*, 469 U.S. at 4, 7. In each of those settings, police officers enjoy "the liberty (again, possessed by every citizen) to address questions to other persons," for "ordinarily the person addressed has an equal right to ignore his interrogator." *Mendenhall*, 446 U.S. at 553 (plurality opinion) (quoting *Terry* v. *Ohio*, 392 U.S. at 32-33 (Harlan, J., concurring)); see also *Terry*, 392 U.S. at 34 (White, J., concurring) ("There is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets").

In *Florida* v. *Bostick*, 501 U.S. 421 (1991), this Court applied that principle in the context of police-citizen interactions on a bus. Federal, state, and local law enforcement authorities, the Court observed, often assign police officers to "airports, train stations, and bus depots" to watch for suspicious activity. "Law enforcement officers stationed at such locations routinely approach individuals, either randomly or because they suspect in some vague way that the individuals may be engaged in criminal activity, and ask them * * * questions" in order to confirm or dispel their suspicions; sometimes, they also ask for consent to perform searches. *Id.* at 431. *Bostick* itself concerned the Broward County Sheriff's Department's practice of boarding buses at scheduled stops and asking passengers for permission to search their luggage for narcotics. The Florida Supreme Court had adopted a per se rule that all police-citizen encounters occurring in the

"cramped confines" of a bus are seizures, and that any passenger's consent to a search in that context is automatically involuntary.

This Court reversed. "Our cases," the Court explained, "make it clear" that "law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, [or] by putting questions to him if the person is willing to listen." *Bostick*, 501 U.S. at 434 (quoting *Royer*, 460 U.S. at 497). "[W]e have held repeatedly," the Court emphasized, that "mere police questioning does not constitute a seizure." *Ibid.* That "unbroken line of decisions," the Court further held, "applies equally to encounters on a bus." 501 U.S. at 439-440.

Like most other Fourth Amendment determinations, the Court explained, the determination of whether a bus passenger has been "seized" must be made in view of "all the circumstances surrounding the encounter." *Bostick*, 501 U.S. at 439. Because the totality-of-the-circumstances test must be context-sensitive, the Court rejected the Florida Supreme Court's focus on whether a reasonable bus passenger would have felt "free to leave" the bus. The Court observed:

> When police attempt to question a person who is walking down the street or through an airport lobby, it makes sense to inquire whether a reasonable person would feel free to continue walking. But when the person is seated on a bus and has no desire to leave, the degree to which a reasonable person would feel that he or she could leave is not an accurate measure of the coercive effect of the encounter.

Id. at 435-436. That is true, the Court explained, because any confinement felt by the bus passenger may be "the natural result of his decision to take the bus" and not a product of police activity. Indeed, in *Bostick* itself, the Court observed that the bus's imminent departure might have prevented the defendant from feeling "free to leave the bus even if the police had not been present." *Ibid.*

For that reason, the decision in *Bostick* explains that courts examining police-citizen encounters on a bus should not ask whether a reasonable person would have felt "free to leave." Instead, courts must inquire whether the police conveyed the message that it is not permissible to "decline the officer's request or otherwise terminate the encounter." 501 U.S. at 436. The location of the encounter is a permissible but not dispositive consideration in that determination. *Id.* at 435. Even on a bus, the Court emphasized, "no seizure occurs when police ask questions of an individual, ask to examine the individual's identification, and request consent to search his or her luggage—so long as the officers do not convey a message that compliance with their requests is required." *Id.* at 437.

Bostick thus makes it clear that the seizure principles applicable in other contexts apply when determining whether the police have effected a seizure on a bus. Courts must consider "all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter." 501 U.S. at 439. See *id.* at 437 ("the crucial test" is whether, "taking into account all of the circumstances surrounding the encounter, the police conduct would 'have communicated to a reasonable person that he was not at

liberty to ignore the police presence and go about his business.'"). Those circumstances include whether the officers displayed any weapons; whether they conveyed any type of threat; whether they used authoritative language or a tone of voice showing that compliance is required; whether they physically touched the citizen; whether they advised the citizen of his right to refuse cooperation; the location of the encounter; whether there was a threatening number of officers; and the officers' proximity to the citizen, as well as the timing of their arrival. See *id.* at 432, 437; *Mendenhall*, 446 U.S. at 554 (plurality opinion); *United States* v. *Hill*, 199 F.3d 1143, 1148 (10th Cir. 1999), cert. denied, 531 U.S. 830 (2000); *United States* v. *Lewis*, 921 F.2d 1294, 1297 (D.C. Cir. 1990).

B. Respondents Were Not Seized Or Otherwise Coerced To Consent When A Police Officer Approached Them On A Bus And Asked To Speak With Them

1. Nothing the police officers said or did in this case would have communicated to a reasonable person that he had no choice but to cooperate. To the contrary, as the district court found, the interaction between Officer Lang and respondents was entirely consensual. Pet. App. 13a; J.A. 132 (Tr. 107).

Three officers boarded the bus with the permission of the driver around the same time as the passengers. The officers were casually dressed, and no weapons were visible. See Pet. App. 3a; J.A. 43, 76-77 (Tr. 11-12, 45-46). When the officers boarded, they did not make a general announcement to the passengers; they did not use the public address system; and they did not hold their badges over their heads. Pet. App. 3a; J.A. 130, 132 (Tr. 105, 107). One officer remained at the front, kneeling in the driver's seat so that he could watch the

other officers and the passengers without obstructing the exit; the other two walked to the back of the bus, so they could interact with individual passengers without blocking the aisle. Pet. App. 3a. The district court thus observed that the officers "could have been mistaken for other passengers." J.A. 126 (Tr. 100); see also *id.* at 108 (Tr. 80) ("We boarded the bus just like we were passengers."); *id.* at 130 (Tr. 105).

To ensure that each passenger with whom he spoke could leave or otherwise avoid him, Officer Lang addressed the passengers from the side or just behind. Pet. App. 3a. Passengers thus were free to get off and on the bus, and passengers on other occassions regularly did so. See Pet. App. 4a; J.A. 81 (Tr. 51). The district court expressly found that, when Officer Lang spoke with respondents, "no one [was] standing in their way," Pet. App. 13a; J.A. 131 (Tr. 106), and that it was "obvious" that respondents could "get up and leave, as [could] the people ahead of them." Pet. App. 13a; J.A. 132 (Tr. 106). Officer Lang spoke to respondents in a quiet, conversational tone of voice, "just loud enough for [respondents] to hear." Pet. App. 4a. See also J.A. 51, 58 (Tr. 19, 26) (officer's testimony that he spoke in a "friendly and courteous" manner, using "a nice tone of * * * voice"). Officer Lang identified himself as a police officer and showed them his badge. He said he was conducting drug and illegal weapons interdiction, and asked if respondents had any bags on the bus. When respondents pointed to a bag in the overhead rack, Lang asked if he could check it and Brown said yes. And when Officer Lang—suspicious that respondents might be wearing heavy jackets and baggy clothing "to conceal weapons or narcotics on their person," J.A. 61 (Tr. 29-30)—asked Brown for permission to pat him down for weapons, Brown said "Sure," pulled

a cell phone out of his pocket, and opened his coat. J.A. 61-62 (Tr. 30); Pet. App. 5a.

As the district court—which heard the testimony and observed Officer Lang's temperament and demeanor—explained, "everything that[] [was] said, everything that took place between Officer Lang and Mr. Drayton and Mr. Brown suggests it was cooperative. There was nothing coercive, there was nothing confrontational about it." Pet. App. 13a; J.A. 132 (Tr. 107); see Pet. App. 13a; J.A. 132 (Tr. 107-108) ("There was * * * nothing in what Officer Lang said or did or the other officers did on that bus that would suggest to a reasonable person that they were not free to leave.").[2] Indeed, respondents faced none of the factors typically found to intimidate people into thinking that they must comply with an officer's request. There were no uniforms, no applications of force, no intimidating movements, no overwhelming show of force, no pointing of weapons, no visible weapons, no blocking of the exit path, no threats, no commands—not even an authoritative tone of voice. Nothing about the officers' conduct

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[2] Seeking to contradict the trial court's express finding that the interaction was cooperative and non-coercive, respondents argued (Br. in Opp. 10) that Officer Lang "agreed" that his style was "kind of 'in your face.'" Respondents, however, omitted Officer Lang's actual testimony and the clarification that followed. Officer Lang's response to the question put to him makes it clear that he thought he was being asked whether he spoke with respondents *face-to-face*, which he did. J.A. 56-57 (Tr. 25). In fact, the Assistant United States Attorney immediately clarified any possible confusion: "I think the question the judge was asking, was there anything confrontational about your discussions?" Officer Lang answered "No, sir. No, sir." J.A. 57 (Tr. 25). See also J.A. 58 (Tr. 26) ("I'm not talking loud. I'm being friendly and courteous, and I'm using 'How are you doing?' this type of—the tone of voice that I'm using. * * * I'm just talking to them in a nice tone of voice.").

suggested that respondents could not decline the officer's request or otherwise terminate the encounter.

Both before and after this Court's decision in *Bostick*, the courts of appeals have almost uniformly agreed that no seizure occurs under such circumstances. For example, in *United States* v. *Flowers*, 912 F.2d 707 (4th Cir. 1990), cert. denied, 501 U.S. 1253 (1991), multiple officers boarded a bus to prevent trafficking in guns and drugs. There, as here, they spoke to the bus passenger "in a casual tone of voice," did "not block the aisle," and did not "display[] weapons or restrain [the passenger] in any way." *Id.* at 711. Under the circumstances, the Fourth Circuit concluded that no seizure had occurred. *Id.* at 709, 712. "Nothing about the officers' conduct here impaired [the passenger's] right to refuse to talk to them or to leave the bus." *Id.* at 709.

Likewise, in *United States* v. *Madison*, 936 F.2d 90, 93, 96 (1991), the Second Circuit held that an officer does not effect a seizure when he speaks to the bus passenger from behind, does not touch him, does not display a weapon, and uses a polite and conversational tone—notwithstanding the presence of another plainclothes officer between the passenger and the exit. Nothing about such an interaction, the court held, would suggest to a reasonable passenger that he could not "go about his business, either by remaining on the bus and declining to cooperate * * *, or by getting off the bus." *Ibid.* Similar decisions abound. See, *e.g.*, *United States* v. *Peters*, 194 F.3d 692, 698 (6th Cir. 1999) (officers did not convey "message that compliance with their request to speak" to train passenger was "required" when officers, dressed in civilian clothes and without any visible weapons, approached passenger, identified themselves, asked questions, and requested the passenger's ticket), cert. denied, 528 U.S. 1174 (2000); *United States* v. *Cooper*, 43 F.3d 140, 146 (5th Cir. 1995) (consent voluntary where plainclothes officer approached bus passenger, asked questions, and requested consent to pat the passenger down); *Lewis*, 921 F.2d at 1297-1300 (passengers not seized when multiple officers entered bus, officer identified himself as a police officer, showed his identification and, in a conversational tone, sought consent to search person or luggage). See also *United States* v. *Broomfield*, 201 F.3d 1270 (10th Cir.), cert. denied, 531 U.S. 830 (2000); *United States* v. *Kim*, 27 F.3d 947, 951-954 (3d Cir. 1994), cert. denied, 513 U.S. 1110 (1995).

The encounter here, in fact, was far less intimidating than the one at issue in *Bostick*. In *Bostick*, the officers —"complete with badges, insignia and one of them holding a recognizable zipper pouch, containing a pistol," 501 U.S. at 431, boarded the bus wearing "raid jackets," *Madison*, 936 F.2d at 96. The officers also asked the defendant for identification and his ticket. *Ibid.* Under the circumstances, warning the passenger of his right to refuse consent could have been thought prudent to dispel any potential discomfort created by the visible weapons or the officers' attire. Here, in contrast, the officers wore plain, casual clothing; they ensured that their weapons were not visible; they deliberately avoided blocking ingress and egress; and they did not ask to see the passengers' tickets or identification. Under such circumstances, there was no hint of coercion to dispel, and no warning of the right to refuse cooperation was required.

2. In the decision below, the Eleventh Circuit did not examine the totality of the circumstances. It did not dispute the district court's findings that "[e]verything that took place between Officer Lang and Mr. Drayton and Mr. Brown suggests that it was coopera-

tive"; that "[t]here was nothing coercive" or "confrontational" about the encounter; and that it was "obvious" that respondents could have left the bus at any time. Pet. App. 13a; J.A. 132 (Tr. 106). Instead, the court relied principally on the fact that Officer Lang began the encounter by identifying himself as a police officer, showing his badge, and explaining that he was conducting drug and weapons interdiction. That introduction, the court held, constitutes a "show of authority" and establishes a seizure. Pet. App. 7a.

In earlier cases, the Eleventh Circuit had specifically distinguished between individual police-citizen interactions on a bus and general announcements made by the police from the front of the bus. General announcements, the court explained, might create an element of coercion that typical personal interactions do not. See Pet. App. 6a; *Guapi*, 144 F.3d at 1396. See also *Broomfield*, 201 F.3d at 1274. In this case, the court of appeals dismissed that distinction as dictum and treated *every* police-citizen interaction on a bus as inherently coercive—as a seizure—if it begins with the officer identifying himself as a law enforcement official. Declaring that Officer Lang's introduction and display of his badge was a "passenger-specific show of authority," the court of appeals found such conduct to be no "less coercive than a general bus-wide" announcement. Pet. App. 7a & n.5.

a. An officer's introduction of himself, display of identification, and announcement of his law-enforcement mission does not convert a consensual encounter into a seizure, even on a bus. A seizure occurs if an officer *invokes* his legal authority to restrain the citizen's liberty, such as where the officer issues a command or otherwise communicates that the citizen is not free to go about his business. See, *e.g.*, *United States* v. *Alarcon-Gonzalez*, 73 F.3d 289 (10th Cir. 1996) (order to "freeze"). As the Court explained in *California* v. *Hodari D.*, 499 U.S. 621, 628 (1991), an officer's "show of authority" may establish a seizure if "the officer's words and actions would have conveyed * * * to a reasonable person" that "he was being ordered to restrict his movement." See also *id.* at 627, 629 (example of a "'show of authority' enjoining [the citizen] to halt"). A seizure does not occur merely because an officer introduces and identifies himself. For that reason, *Bostick* explains that the police may not "demand of passengers their 'voluntary' cooperation" through "an '*intimidating* show of authority,'" such as pointing their weapons or otherwise communicating that the passenger must cooperate. 501 U.S. at 438. But merely introducing oneself as a law enforcement officer and showing a badge or other official form of identification allows the citizen to understand that he is communicating with the police rather than a random or potentially threatening stranger. It is not a seizure.

The suggestion that the police necessarily seize citizens when they identify themselves in one-on-one interactions is contrary to this Court's precedents. In *Florida* v. *Rodriguez*, 469 U.S. at 4-6, for example, the Court rejected the claim that the defendant was seized when an officer approached him in an airport, "showed his badge," and asked the defendant if he might "step aside and talk with" him. Instead, the Court held, the interaction was "clearly the sort of consensual encounter that implicates no Fourth Amendment interest." *Id.* at 5-6.

Similarly, in *INS* v. *Delgado*, 466 U.S. at 212, 217-221, armed INS agents wearing badges moved through a private factory, identified themselves as they approached individual employees, and asked those em-

ployees questions about their citizenship. The Court concluded that the agents had not "seized" the employees within the meaning of the Fourth Amendment because they had not created "circumstances * * * so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave" unless he cooperated. *Id.* at 216. Indeed, after reviewing the description of the individual interviews, the Court was "satisfie[d] * * * that the encounters were classic consensual encounters rather than Fourth Amendment seizures." *Id.* at 221. See also *Royer*, 460 U.S. at 497 (initial approach by police officer, identifying himself and asking to speak with citizen, not a seizure); *Mendenhall*, 446 U.S. at 555 (same).

More recently, the Court in *Bostick* reaffirmed the proposition—which had "been endorsed by the Court any number of times"—that a police officer does not effect a seizure by asking questions of an individual who is willing to listen. *Bostick*, 501 U.S. at 439. That proposition, the Court further clarified, "applies equally to encounters on a bus." *Id.* at 439-440. The court of appeals' contrary conclusion, that officers effect a seizure merely by introducing and identifying themselves as police officers, cannot be reconciled with those decisions.

b. Although not necessary to its decision, the court of appeals also suggested that Officer Hoover's presence in the bus driver's seat could contribute to a finding that respondents had been seized. Pet. App. 9a.[3]

[3] The presence of the officer near the front of the bus does not appear to have been a necessary factor in the court of appeals' decision. The court first concluded that this case is indistinguishable from *Washington*—an earlier Eleventh Circuit decision that found a Fourth Amendment seizure—and rejected the government's efforts to distinguish *Washington*. Pet. App. 6a-8a. Then, in the final paragraph of its analysis, the court of appeals stated that Officer Hoover's presence at the front of the bus is a "factual difference between this case and *Washington*" that "cuts in the defendant's favor." *Id.* at 9a.

The court of appeals did not suggest that Officer Hoover blocked the exit. Nor did the court suggest that Officer Hoover, who was wearing casual attire, did or said anything to suggest that passengers would not be allowed to leave. Indeed, the court cited nothing in the record suggesting that the passengers even realized that Hoover was a police officer. See J.A. 126, 130 (Tr. 100, 105). Nonetheless, the court of appeals suggested that "seeing an officer stationed at the bus exit during a police interdiction might make a reasonable person feel less free to leave the bus." Pet. App. 9a.

That suggestion is directly at odds with this Court's decisions. For example, there were multiple officers stationed near the exits of the factory in *Delgado*. See 466 U.S. at 217-218. See also *Bostick*, 501 U.S. at 436 (indicating that, in *Delgado*, "[s]everal INS agents" stood "near the building's exits"). This Court expressly rebuffed the suggestion that their presence converted otherwise consensual interactions into seizures. Rejecting the *Delgado* plaintiffs' contention that the "stationing" of agents near the exits suggested an "intent to prevent people from leaving," the Court explained that "there is nothing in the record indicating that this is what the agents at the doors actually did." 466 U.S. at 218. As a result, the Court explained, "[t]he presence of agents by exits posed no reasonable threat of detention to" the factory workers, and "the mere possibility that they would be questioned if they sought to leave * * * should not have resulted in any reasonable apprehension by any of them that they would

be seized or detained in any meaningful way." *Id.* at 219. The court of appeals offered no reason why *Delgado*'s analysis does not apply with equal force here. See also *United States* v. *Stephens*, 232 F.3d 746, 747-748 (9th Cir. 2000) (O'Scannlain, J., dissenting from denial of rehearing en banc).

Indeed, the record undercuts the court of appeals' suggestion that Officer Hoover's presence communicated to passengers that they could not leave the bus. As the court of appeals conceded, passengers "often exited the bus while officers were on it." Pet. App. 8a. "That's every day," Officer Lang testified. "Somebody is always getting up and getting off the bus when we're coming down the aisle." J.A. 81 (Tr. 51).[4] Testimony in other cases similarly confirms that bus passengers regularly decline cooperation or leave the bus while the officers are on it. See, *e.g.*, *Lewis*, 921 F.2d at 1299 (noting officer's testimony that "about one in five passengers declines to cooperate"). See also J.A. 95-96 (Tr. 66) (individuals declined to give Lang consent about once a week).

The court of appeals' analysis, in any event, focuses on the wrong question. Like the Florida Supreme Court in *Bostick*, the court of appeals asked whether a particular circumstance (here, Hoover's presence in the bus driver's seat) would make "a reasonable person feel less free *to leave the bus*." Pet. App. 9a (emphasis added). *Bostick* makes it clear that "the degree to which a reasonable person would feel that he or she

[4] The record shows that the officers ordinarily followed the same pattern when conducting interdictions. One officer was generally positioned in the bus driver's seat to ensure officer safety, while the other two officers proceeded to the back of the bus. J.A. 43, 77 (Tr. 10-11, 46).

could *leave* is *not* an accurate measure of the coercive effect of the encounter." 501 U.S. at 435-436 (emphases added). Instead, courts must ask "whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter." *Id.* at 439. See also *id.* at 436 (the "appropriate inquiry is whether a reasonable person would feel free to decline the officers' request or otherwise terminate the encounter"); *id.* at 437 ("the crucial test" is whether, "taking into account all of the circumstances surrounding the encounter, the police conduct would 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.'"). Like the presence of INS agents near the factory exits in *Delgado*, a plainclothes officer's presence at the front of the bus "should have given respondents no reason to believe they would be detained" or otherwise punished if they refused to cooperate. 466 U.S. at 218. As the Court explained in *Bostick*, "an individual may decline an officer's request without fearing prosecution. * * * [R]efusal to cooperate, without more, does not furnish the minimum level of objective justification needed for a detention or seizure." 501 U.S. at 437. See also Pet. App. 3a-4a ("passengers who declined to have their baggage searched or who wished to exit the bus at any time would have been permitted to do so without argument"); J.A. 70-71, 98 (Tr. 39-40, 69) (officer's testimony).

C. The Court of Appeals' Decision Effectively Establishes A Per Se Warning Requirement In Conflict With *Florida* v. *Bostick*

Rather than engage in the necessary examination of the "totality of the circumstances," the Eleventh Cir-

cuit has, through a series of cases, effectively established a per se rule that officers must offer bus passengers *Miranda*-like warnings of the right to refuse consent. That requirement is at odds with *Bostick*'s specific rejection of per se rules governing bus encounters and this Court's repeated rejection of such a warning requirement in the Fourth Amendment context more generally.

1. In *Guapi*, two officers boarded the bus at a scheduled stop, and one of them made a general announcement to all passengers that he wanted to check onboard luggage for drugs and contraband. After waiting for the passengers to open their bags, one of the officers proceeded down the aisle and inspected each passenger's bag. Because the officers started at the front of the bus—and because the bus driver had ordered the passengers to get off the bus—the passengers had to maneuver around the officers in the aisle. The Eleventh Circuit held that a Fourth Amendment seizure had occurred. Under *Florida* v. *Bostick*, 501 U.S. 429 (1991), that court explained, "the appropriate inquiry is whether under 'all the circumstances surrounding the encounter . . . the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter.'" 144 F.3d at 1394 (quoting 501 U.S. at 439). In the case before it, the Eleventh Circuit stated, the officer's general announcement effectively meant that "the attention and cooperation of all passengers [was] required." 144 F.3d at 1396.

The *Guapi* court reasoned that the coercive effect of such an announcement was qualitatively different from a one-on-one interaction. It is not unusual for one passenger to approach another, the court explained, and "there is no reason to believe that when police officers

engage in similar behavior that they are coercing or intimidating citizens." 144 F.3d at 1396. The court also thought it significant that the officer, "[i]nstead of beginning his search in the rear of the bus, which would have permitted those passengers who felt uncomfortable with the procedures to exit without confronting the police," had "stood in front of each passenger" and thereby "blocked the aisle." *Ibid.* While declining to impose a "per se rule requiring passengers to be informed of their constitutional rights," the court found that the announcement and the blocking of the aisle effectuated a seizure because a reasonable person would not have felt free to refuse cooperation absent a warning of the right to do so. *Id.* at 1395-1396.

In *Washington*, the Eleventh Circuit again concluded that the police had seized the defendant and thereby rendered his consent to search invalid. *Washington*, 151 F.3d at 1356. As in *Guapi*, the court noted that the "appropriate inquiry" under the Fourth Amendment and *Bostick* was whether, under all of the circumstances, a reasonable person would have felt that cooperation was required. *Washington*, 151 F.3d at 1355. The officer in *Washington* had made an announcement from the front of the bus, while holding "his badge above his head and identif[ying] himself as a federal agent." *Id.* at 1357. "He announced what he wanted the passengers to do, and what he was going to do." *Ibid.* Under those circumstances, and "[a]bsent some positive indication that [the passengers] were free not to cooperate," the court found it "doubtful a passenger would think he or she had the choice to ignore the police presence." *Ibid.* Judge Black dissented. The majority, she explained, had in effect established a "per se rule" that officers must explicitly advise bus passengers of their right to refuse consent before consent will be

deemed voluntary. *Id.* at 1357-1358. That result, she contended, "conflicts" with this Court's "consistent[] reject[ion] [of] per se rules in the Fourth Amendment context." *Id.* at 1358 (citing *Bostick*, 501 U.S. at 439-440, and *Ohio* v. *Robinette*, 519 U.S. 33 (1996)); see also *ibid.* (majority's rule "departs from the spirit, if not the letter, of *Bostick* and *Robinette*").

In this case, the officers made no general announcement from the front of the bus. Rather, they approached passengers individually, explained their identity and purpose, and sought consent to perform searches, without suggesting that passengers must cooperate or remain on the bus. The officers started at the back of the bus to avoid blocking the aisle; they approached each passenger from the side or slightly behind to ensure that the passenger could leave; and the plainclothes officer who stayed at the front (for safety reasons) knelt in the driver's seat so as to leave the exit unobstructed. The Eleventh Circuit nonetheless held that the case was "controlled" by *Washington* and that, absent warnings of the right to refuse consent, the passengers on the bus were seized. Pet. App. 5a-6a.

Collectively, those Eleventh Circuit cases effectively require officers to warn passengers that they have the right to decline cooperation. As respondents' counsel explained to the district court, "[t]he Eleventh Circuit has made it fairly clear that they're going to insist that police officers tell the passengers they have a right to refuse the search or they're going to find the searches illegal." J.A. 119 (Tr. 92). See also J.A. 127 (Tr. 101) (asserting that the officers have an affirmative "obligation * * * to make sure" passengers "understand * * * that they have the right to refuse, or the right not to consent"). If warnings are required in the innocuous circumstances of this case, it is difficult to imagine a situation in which they would not be necessary. For that reason, Judge Black dissented in *Washington*: "Short of telling the passengers of the right to refuse consent," she explained, "it is difficult to conceive of any actions these officers could have taken to make this search any more reasonable." *Washington*, 151 F.3d at 1358 (Black, J., dissenting). And for that reason, the Tenth Circuit properly declined to follow decisions like this one and its predecessors. See *Broomfield*, 201 F.3d at 1275 (characterizing *Washington* as having created a "per se rule" that officers must advise bus passengers of their right to refuse consent). See also *Stephens*, 206 F.3d at 920 n.2 (Sneed, J., dissenting) (under Eleventh Circuit approach, officers must use "a *Miranda*-like warning incorporating the advice that all passengers * * * could stay on the bus and refuse to answer any questions").

The requirement that officers warn bus passengers of their right to refuse consent violates two central teachings of this Court's Fourth Amendment cases. First, as *Bostick* reiterated in the context of bus encounters, per se rules are not an appropriate means of resolving most Fourth Amendment "reasonableness" determinations. 501 U.S. at 439-440. See also *Ohio* v. *Robinette*, 519 U.S. 33, 39 (1996). Instead, the "endless variations in the facts and circumstances" must be examined under an objective standard based on the "totality of the circumstances." *Royer*, 460 U.S. at 506; see also *Michigan* v. *Chesternut*, 486 U.S. 567, 572-573 (1988).

Second, such a rule would contravene this Court's holding that consent to search need not be preceded by individual advice of the right to refuse consent. Addressing that issue in the context of voluntariness, in

Schneckloth v. *Bustamonte*, *supra*, the Court carefully explained that a specific "waiver" of one's rights, made with full knowledge of those rights, is required only where the right is fundamental and necessary to guarantee a fair trial, such as the right to counsel. By contrast, the Court explained, the "protections of the Fourth Amendment are of a wholly different order, and have nothing whatever to do with promoting the fair ascertainment of truth at a criminal trial." 412 U.S. at 245. See also *New York* v. *Hill*, 528 U.S. 110, 114 (2000) ("What suffices for waiver depends on the nature of the right at issue."); *United States* v. *Olano*, 507 U.S. 725, 733 (1993) ("Whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed * * * all depend on the right at stake."). The Court regarded it as both unnecessary and unrealistic to impose the exacting standards of a knowing and intelligent waiver to the "informal, unstructured context of a consent search." 412 U.S. at 245. Instead, it held that the voluntariness of consent must be examined in light of all the circumstances, with the subject's knowledge of the right to refuse as one relevant factor, but that it need not be shown "as a prerequisite to establishing a voluntary consent." *Id.* at 249.[5]

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[5] Whether or not there has been a "seizure" and whether or not consent is "voluntary" are sometimes distinct inquiries. A defendant who has been "seized" may nonetheless voluntarily and validly consent to a search. See, *e.g.*, *United States* v. *Watson*, 423 U.S. 411, 424 (1976) ("[T]he fact of custody alone has never been enough in itself to demonstrate a coerced confession or consent to search."). The inquiries are related, however, where an individual's movement is "restricted by a factor independent of police conduct—*i.e.*, by his being a passenger on a bus." 501 U.S. at 436. In that context, the relevant inquiry is whether the encounter was consensual, and such "consent" must be voluntary. It may be that, even after an involuntary encounter—a "seizure"—the defendant can still give voluntary consent to a search. Because there was no seizure in this case under the *Bostick* test, however, the Court need not address whether the voluntariness of respondents' consent would independently justify the admission of a potential fruit of an unlawful seizure. Cf. *Watson*, 423 U.S. at 426 (Powell, J., concurring) (Because the "evidence that [the defendant's] consent was the product of free will is so overwhelming, * * * I would have held the consent voluntary even on the assumption that the preceding warrantless arrest was unconstitutional").

More recently, the Court reiterated the same principle when it held that a motorist stopped for a traffic violation need not be told he was "free to go" before being asked for his consent to search. *Ohio* v. *Robinette*, 519 U.S. at 39-40. Recalling its holding in *Schneckloth*, the Court observed that, "just as it 'would be thoroughly impractical to impose on the normal consent search the detailed requirements of an effective warning,' * * * so too would it be unrealistic to require police officers to always inform detainees that they are free to go before a consent to search may be deemed voluntary." *Robinette*, 519 U.S. at 39-40 (quoting *Schneckloth* v. *Bustamonte*, 412 U.S. at 231). See *United States* v. *Watson*, 423 U.S. 411, 424-425 (1976); *United States* v. *Matlock*, 415 U.S. 164, 167 n.2 (1974).[6]

---

[6] Indeed, any requirement that officers warn individuals of their right to refuse consent creates numerous dangers. Passengers might be confused or intimidated by incomplete or inarticulate warnings. Courts, moreover, would repeatedly be called upon to pass on the adequacy of such warnings. For example, in *United States* v. *Stephens*, the majority faulted the officer's warning because the officer advised passengers that they were "not under arrest" and were "free to leave," but added, "[h]owever, we would like to talk to you." 206 F.3d at 916. The warning, the majority stated, conveyed the impression that passengers could avoid co-

When the correct legal standard is applied in this case, and all the facts and circumstances are considered, it is readily apparent that no seizure took place. As the district court found, "[t]here was nothing coercive" or "confrontational" about the interaction, and "[e]verything that took place between Officer Lang and Mr. Drayton and Mr. Brown suggests that it was cooperative." Because the court of appeals' contrary decision rests on fundamental legal errors, it should be reversed.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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operating only by getting off the bus. *Id.* at 917. Officers should not be placed in the predicament of having to give warnings, yet risk that the very warnings might be found coercive.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

CHRISTOPHER DRAYTON AND CLIFTON BROWN, JR.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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QUESTION PRESENTED

Whether three police officers, who boarded a bus solely to obtain consent to search passengers and their bags, and who sought consent through one officer's "in your face" show of authority, a second officer assisting his search, and a third officer kneeling in the driver's seat watching passengers, but who never advised passengers of their rights to ignore officers, and to refuse to have their carry-on bags searched and their "groin areas" frisked, violated the passengers' Fourth Amendment rights?

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INTRODUCTION*

This case addresses the proper circumstances under which police can randomly board passenger buses for the purpose of obtaining "consent" to search passengers' carry-on luggage and persons, including their groin area, without violating the Fourth Amendment. This case focuses on whether a reasonable person would feel "free to ignore" police officers who seek consensual encounters with the citizen, who choose to do so in the cramped confines of a bus, and who seek to search both carry-on bags as well as passengers' bodies. Whether passengers have been advised that they can ignore the officers and refuse consent for such searches remains an important factor in the totality of the circumstances test.

A reasonable passenger could not ignore the "in your face" show of authority which officers employed in this case. That the officers' behavior was not the same as an encounter with another passenger is amply demonstrated by the fact that a reasonable person would have told another passenger to "back off" shortly after the person stood behind them, leaned close to their face, and started talking. The critical, if not only, distinction avoiding the same passenger response here was the officer's "show of authority," that is, the fact that he was a police officer. The officers chose and exploited a coercive environment in which they knew they were most likely to get the consent they sought.

If officers truly want to conduct "voluntary" searches, of passengers seated in the cramped confines of a bus, they should ask for volunteers. Looking at the issue in this light makes clear that no reasonable person would volunteer, or make a free choice, to have his groin area searched by a stranger, police officer or not. It would be entirely

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* Counsel gratefully acknowledges the invaluable contributions of Mr. Dennis Callahan, J.D. candidate at William and Mary College of Law.

unreasonable to have a constitutional principle based upon such a standard. The record before this Court makes clear that respondents did all a reasonable person could do under the circumstances to ignore the police officers, and the officers chose to construe that as consent. In any event, Drayton's silence cannot be construed as anything more than mere acquiescence to authority.

STATEMENT OF THE CASE

1. On February 4, 1999, respondents were passengers on a Greyhound bus traveling from Fort Lauderdale, Florida, to Indianapolis. See bus tickets, Govt. Trial Ex. 3. Both had checked luggage, and Brown had a carry-on bag. J.A. 111 (Tr. 83).[1] About Noon, the bus made a scheduled stop at the Greyhound bus terminal in Tallahassee, Florida. Respondents and other passengers were required to exit the bus. J.A. 104 (Tr. 75-76).

The Tallahassee Police Department ("TPD") Drug Interdiction Team generally goes to the bus station twice daily, at 5:00 a.m. and Noon, to intercept buses arriving from South Florida. J.A. 69 (Tr. 37-38). On this date, the three officers, Lang, Blackburn, and Hoover, arrived before Noon and watched passengers deboard the arriving buses. J.A. 103 (Tr. 75). The officers had a drug dog with them, J.A. 136 (Trial Tr. 11), but no testimony revealed the dog's role. They first saw respondents about Noon. J.A. 139 (Trial Tr. 14).

As respondents reboarded, the driver collected their tickets, J.A. 77 (Tr. 47), while the officers observed. J.A. 105 (Tr. 76). There were approximately 25-30 passengers on the 47-

[1] "Tr." refers to the transcript of the March 16, 1999, suppression hearing. The only witness was Officer Lang of the Tallahassee Police Department. "Trial Tr." refers to the transcript of Drayton's trial.

passenger bus.[2] J.A. 79, 102 (Tr. 49, 73). Once passengers were seated, the driver left to complete the departure process. J.A. 77-78 (Tr. 47-48). The driver turned the bus over to the three officers, saying something like, "It's all yours." *Id.*; J.A. 108-09 (Tr. 80).

Respondents' bus was scheduled to depart at 12:45 p.m. Govt. Trial Ex. 3. At approximately 12:40 p.m., after passengers were seated,[3] J.A. 108 (Tr. 80), the three officers boarded the bus for the purpose of obtaining consent to search luggage and passengers.[4] J.A. 42, 49, 55 (Tr. 10, 16, 24).

[2] Respondents have lodged with the Clerk interior measurements and photographs of this type bus. *See* Stern et al., *Supreme Court Practice* 556 (7th ed. 1993).

[3] The district court stated "the only testimony I heard here was that . . . they got on right with the passengers, so they could have been mistaken for other passengers." J.A. 126 (Tr. 100).

[4] The bus search conducted in this case was part of TPD's routine drug interdiction searches at the Tallahassee bus station. J.A. 42 (Tr. 10). Lang testified his team has conducted such searches for three years, *id.*, up to six or seven buses a day, J.A. 80 (Tr. 49), four or five days a week, J.A. 80 (Tr. 50). Conservatively, they had boarded buses carrying 78,000 passengers in that period. J.A. 80, 118 (Tr. 49, 90-91).

Lang testified it is very rare for passengers to decline to be searched. In the past year, only "five or six people" had so declined. J.A. 81 (Tr. 51). He agreed that is "not very many." *Id.* Indeed, given the number of buses searched and the number of passengers on each bus (25-30), that is an extremely small percentage of refusals, less than 1/100th of 1%. J.A. 118 (Tr. 91). Lang agreed "the overwhelming majority of these people feel it is their duty to cooperate with [him]" and therefore "cooperate." J.A. 99-100 (Tr. 70-71).

The prosecutor acknowledged that "[o]ne reason for [Lang's] success is his audience. People on buses are . . . there because they're generally economically disadvantaged . . . They need to go somewhere, and that's the only way they have to get there." J.A. 39 (Tr. 5-6).

Lang also testified that "usually [passengers] are some (sic) confrontational when they say, 'No, you're not going to search my stuff.'" J.A. 98 (Tr. 69).

They did not have warrants, probable cause, or reasonable suspicion. J.A. 83-84, 113 (Tr. 53-54, 85). If he wanted to "check" a particular bag or person, Lang endeavored to obtain consent. J.A. 49-50, 99 (Tr. 18, 69-70).

Lang specifically matched passengers with carry-on luggage: "I make sure that I put a piece of luggage, which is above them, with everybody." J.A. 50, 140, 52 (Tr. 17, 20); Trial Tr. 15-16.

The officers displayed their badges, usually on chains around their necks, or sometimes in their hands. J.A. 139 (Trial Tr. 14). They were wearing plain clothes. J.A. 43-44 (Tr. 11-12). All wore guns in side holsters, covered by shirts hanging out or jackets. J.A. 43, 76-77 (Tr. 11, 46). They had handcuffs. J.A. 45, 65 (Tr. 12, 34).

Hoover boarded the bus first and "kne[lt] in the driver's seat looking over the [plexiglass] back" to watch passengers' reactions. J.A. 45, 89-91 (Tr. 12-13, 60-61). Passengers could see him. J.A. 46 (Tr. 14).[5] Hoover reported to Lang if someone obviously reacted to Lang's presence. J.A. 101-02 (Tr. 72-73).

Blackburn and Lang entered behind Hoover and walked to the back of the bus. J.A. 47 (Tr. 14). The officers did not make any general announcement identifying themselves or explaining what they were doing on the bus. J.A. 48 (Tr. 15-16). Nor did the officers at any time inform passengers they had a right to refuse to talk to the officers, to have their bags searched, or to be frisked. J.A. 81, 93 (Tr. 51, 67).

At the back of the bus, Blackburn and Lang "work[ed] from the back of the bus forward" as a team. J.A. 47-49, 94 (Tr. 15-16, 65). While Lang observed, Blackburn spoke to the passenger in the very rear seat, "identif[ying] himself and obtain[ing] consent . . . to check[] his luggage." J.A. 47, 49

[5] Lang's trial testimony implied that Hoover remained *outside* the bus door. J.A. 140 (Trial Tr. 15).

(Tr. 14, 16). That passenger's carry-on bag was searched, but no contraband was found. J.A. 49 (Tr. 17).

Lang then began working forward, with Blackburn observing and assisting; Lang talked with the passenger in the next seat forward, but "decided [he] didn't want to check [him]." *Id.* Lang moved to the passenger across the aisle, identified himself, "asked for consent and . . . was given consent to check his luggage." That passenger's bag was searched, but no contraband was found. J.A. 50-51, 53 (Tr. 17-19, 21).

Lang then approached respondents, seated on the driver's side of the bus. Drayton was in the aisle seat, and Brown by the window. J.A. 52-54 (Tr. 19-22). Lang conceded he had no probable cause or reasonable suspicion. J.A. 83-84 (Tr. 53-54).

Lang stood "with his back to the rear of the bus and facing the front of the bus and approaching them from over [Drayton's] right shoulder." J.A. 55-56 (Tr. 23-24). An overhead luggage rack extended over both seats, requiring the inside passenger to duck his head to stand up or get out. J.A. 55 (Tr. 23). If someone wanted to get off, Lang "turn[ed] to the side and let them come past." J.A. 68 (Tr. 37).

Lang's face was "12 to 18 inches" from Drayton's and "a couple of feet over from Mr. Brown." J.A. 57 (Tr. 25). He agreed with the district court's characterization that his style was "kind of 'in your face.'" J.A. 56 (Tr. 25).[6] His "total focus" is on one passenger. J.A. 51 (Tr. 19).

[6] The government asserts the testimony "makes it clear that [Lang] thought he was being asked whether he spoke with respondents *face-to-face*, which he did." Govt. Br. 19 n.2 (emphasis in original). That is clearly not correct. The testimony does not reveal what Lang *thought* he was being asked, only that he agreed he used an "in your face" style. In any event, the government's attempt to "explain" Lang's testimony is untenable. Lang also agreed with the district court that he was "*not* . . . face to face" with respondents. J.A. 56 (Tr. 24) (emphasis added).

His tone of voice was intended to be heard only by the passenger being addressed, J.A. 51-52 (Tr. 19-20), but his tone demonstrated at the suppression hearing "carr[ied] for a considerable distance." J.A. 57 (Tr. 26).

His face so close to Drayton's, Lang testified he held up his badge to show "that [he is] the authority." J.A. 58, 77, 98, 115 (Tr. 26, 45-46, 69, 87). He announced:

> I'm Investigator Lang out of Tallahassee Police Department. We're conducting bus interdiction, make (sic) sure there's no weapons or drugs on the bus. We would like for (sic) your cooperation. Do you have any luggage on the bus?[7]

J.A. 82, 110 (Tr. 52-53, 82); see also J.A. 55-56 (Tr. 23-24). Lang never asked – as a question – whether they would cooperate. J.A. 93-94 (Tr. 64). "I tell them who I am, *what I am doing.*" J.A. 98-99 (Tr. 69-70) (emphasis added).

Although Lang expressed ambivalence whether both respondents pointed to a green bag on the overhead rack, he appeared to settle on Brown: "So [Brown] was the one pointing." The bag belonged to Brown. J.A. 55-57 (Tr. 24-25). Lang said, "Do you mind if I check it?" J.A. 56 (Tr. 24). Brown said, "Go ahead." *Id.*

Rather, he emphasized he leaned over them from behind so he would not block the aisle.

[7] Lang testified to slightly different phraseology at several points, but twice included the phrase, "We would like for your cooperation," before asking if they had any carry-on luggage. J.A. 55, 82 (Tr. 23-24, 52). The prosecutor noted that "Frankly, the fewer things you ask people to do, the more likely they are to do them. As quickly as possible he gets to the point of can he search their luggage or . . . their person or both." J.A. 38 (Tr. 5). Consistent with this knowledge, Lang does not ask for passengers' tickets, identification, or names. J.A. 50 (Tr. 18). In fact, he testified passengers do not like giving out their names. J.A. 88-89 (Tr. 59).

Lang retrieved the bag and handed it to Blackburn, who searched it. No contraband was found. Pet. App. 4a; J.A. 56, 59-61 (Tr. 24, 27-29).

Lang testified at the suppression hearing that he then "noticed that [respondents] were both wearing large jackets and baggy pants," which he found "kind of odd" because "the weather was warm."[8] J.A. 61 (Tr. 29-30). He testified he found their style of dress "significan[t]" because "people have been known to conceal weapons or narcotics on their person." Tr. 61 (Tr. 30); but see Def. Ex. 1 (Lang's report states: "This

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[8] The record is unclear when Lang first noticed respondents' clothing. At the suppression hearing, Lang testified he did not "have anybody targeted or anything like that" when he boarded the bus, J.A. 105 (Tr. 76-77), and that he first noticed their clothing after he obtained permission to search Brown's carry-on bag. J.A. 61 (Tr. 29-30). He noticed they were wearing coats, and it was not that cold for early February. J.A. 105 (Tr. 77). He acknowledged it might be cold in their northern destination and sometimes gets cold on the buses. J.A. 83, 112-113 (Tr. 53, 84-85). At Drayton's trial, however, Lang testified he first noticed respondents "inside the terminal," and "again when they boarded the bus," and noticed their clothing. J.A. 139 (Trial Tr. 14). Lang did not, however, approach respondents until they were seated on the bus.

As to the fact that the men were wearing their coats, the Court can take judicial notice that the weather that day averaged, in Tallahassee 63°, and in Indianapolis (where they would presumably not arrive until mid-night) 35°. NOAA, National Climatic Data Ctr., Local Climatological Data (provided through Florida Climate Center, Office of State Climatologist). *See Ornelas* v. *United States*, 517 U.S. 690, 699-700 (1996) (making relevant weather observations and noting that "background facts" inform the judge's assessment of the "historical facts"). Also, Lang's testimony that respondents were "overcooperative," "almost too cooperative," J.A. 59, 111 (Tr. 28, 83), was presumably a reference to Brown, since he was the only one to respond verbally to the officers, and this testimony supports a finding that respondents' will was overborne by the coercive environment. Further, a passengers' "cooperation," or lack thereof, should not even be relevant if passengers are truly "free to ignore" the police.

is a known area to conceal *drugs* while traveling on the bus") (emphasis added).

Lang then asked Brown, "Do you mind if I check your person for weapons?" J.A. 91-92, 143 (Tr. 62-63; Trial Tr. 19); Def. Ex. 1, J.A. 113 (Tr. 86) (Lang's report states: "I asked for permission to check their person *for weapons*") (emphasis added); see also J.A. 92 (Tr. 63) (Q. ". . . you asked for limited authority to search for a weapon? A. Uh-huh.").

Brown responded, "'Sure.'" J.A. 61 (Tr. 30). He then leaned up, took a cell phone out of his pocket, and held open his jacket. J.A. 62 (Tr. 30); see also J.A. 143 (Tr. 19).

Lang's report states: "I checked the coat and then the waist area of Brown. I proceeded to check his groin area and touched an unknown object in that area." Def. Ex. 1, J.A. 113 (Tr. 85-86). Lang testified he first patted down Brown's jacket, then asked Brown to lean forward and frisked behind him, and then frisked Brown from his waist to his thighs, including "the groin or upper part of the legs." J.A. 62 (Tr. 31). Lang felt "hard object[s]" that were not "part of his anatomy." J.A. 144 (Trial Tr. 19); see also J.A. 63 (Tr. 31-32).

Lang asked Brown "did he mind standing up," and Brown stepped past Drayton into the aisle. J.A. 65 (Tr. 33). Lang signaled for Hoover to come to the back; Blackburn gave Lang handcuffs; Lang handcuffed Brown; and Hoover escorted Brown off the bus. J.A. 63-64 (Tr. 32-33).

Lang then turned his focus to Drayton and asked, "'Mind if I check you?'" J.A. 65 (Tr. 33). Drayton lifted his hands "maybe eight inches off his legs." J.A. 65 (Tr. 34). Lang then searched Drayton and, in the groin area, "felt the same thing with him." *Id.* Lang asked Drayton to stand, handcuffed him, and escorted him off the bus. *Id.* Lang also retrieved respondents' checked luggage from the bus. J.A. 111 (Tr. 83-84).

Drayton and Brown were escorted to an adjacent parking lot. J.A. 65 (Tr. 34). Officers read their *Miranda* rights, then unbuttoned their pants. J.A. 66 (Tr. 35). Each respondent was wearing several pairs of boxer shorts with bundles of cocaine taped between layers. *Id.* Brown had three packages containing 483 grams of cocaine, and Drayton had two packages with 295 grams. J.A. 67 (Tr. 35). The packages were round, about five inches long and one-and-a-half to two inches in diameter. J.A. 66 (Tr. 35).

The officers are usually on the bus 15 to 20 minutes, enough time to search two to three passengers. J.A. 69-70 (Tr. 38-39). The driver is sometimes waiting when they finish. J.A. 79 (Tr. 48). Lang denied they ever delay buses. J.A. 69 (Tr. 38).

Lang agreed that advising passengers of their right to refuse takes "only three to five seconds" and imposes no "additional burden" on him. J.A. 97 (Tr. 67-68). He has previously said something like, "'You do have a right to refuse, but I would like for your cooperation,'" but not on this date. J.A. 81-82, 93 (Tr. 51, 64). Passengers are not told some people occasionally refuse, and Lang agreed they would have no way of knowing this. J.A. 96 (Tr. 66-67).

2. Respondents were charged by indictment with conspiring to possess powder cocaine with intent to distribute, in violation of 21 U.S.C. §§ 841(a)(1) and 846, and possessing powder cocaine with intent to distribute, in violation of 21 U.S.C. § 841(a)(1). J.A. 6.

Respondents filed motions to suppress, and a consolidated suppression hearing was held. The government agreed there was no probable cause or reasonable suspicion, that the only issue was consent. J.A. 113, 37 (Tr. 85, 3); see also government's Response, J.A. 10. The government conceded the Eleventh Circuit "specifically and repeatedly say[s], there is no per se rule." J.A 127 (Tr. 102). The district court

agreed. J.A. 131 (Tr. 106). Neither party raised the issue of seizure.

The district court denied the motions to suppress. J.A. 11.

3. The court of appeals reversed and remanded with instructions to grant the motions to suppress.

The government filed a petition for rehearing en banc. J.A. 32. *Not one judge*, not even the dissenter in *Washington*, voted to rehear the case. *Id.*

SUMMARY OF ARGUMENT

The government's argument contains two fatal flaws, both of which stem from a fundamentally incorrect reading of the Eleventh Circuit's decisions. The Eleventh Circuit's opinion neither created a *per se* rule that a bus passenger's consent will be invalid absent advice of the right to refuse, nor held that respondents were seized.

Most importantly, regardless of the rubric under which this warrantless, suspicionless police-citizen encounter is analyzed, it is clear that respondents were seized and did not give voluntary and uncoerced consent to searches of their groin areas.

ARGUMENT

I. THE COURT OF APPEALS APPLIED THE CORRECT LEGAL STANDARD; FURTHER, IT HAS NOT ADOPTED ANY *PER SE* RULE REQUIRING THAT PASSENGERS BE ADVISED OF THEIR RIGHTS.

As an initial matter, it is important to understand what the court of appeals did *not* say, either in the opinion below or in the *Washington* and *Guapi* opinions of which the government complains. *First*, the government is wrong in asserting that the court of appeals "held that respondents had been illegally

seized" within the meaning of the Fourth Amendment. Govt. Br. 10. The court of appeals did not even address whether respondents were "seized." Instead, the sole issue addressed by the court of appeals was whether respondents gave voluntary consents.[9] This distinction is important because several of the government's contentions about the scope and potential impact of the decision below are misguidedly based on its mischaracterization of the opinion. *Second*, the court of appeals did not "effectively establish[] a per se rule that officers must offer bus passengers *Miranda*-like warnings of the right to refuse consent." Govt. Br. 28. The court of appeals did not even *address* that factor in this case. Rather, the court of appeals has consistently adhered to this Court's totality of the circumstances test, in each case applying the factors relevant to the issue at hand.

A. The Eleventh Circuit Did Not Address Whether Respondents Were Seized.

In our view, much of the government's criticism of the court of appeals' opinion is misdirected because it is premised on the incorrect notion that the court of appeals held that respondents were "illegally seized" during their encounter with the police. Govt. Br. 10; see also *id.* at 12, 23. However, the court of appeals did *not* hold that the police conduct in this case effected a "seizure." The court of appeals did not even address whether a seizure occurred. Instead, "[t]he only issue" addressed by the court of appeals was "whether the consent given by each defendant for the search was 'uncoerced and legally voluntary' under the Fourth Amendment." Pet. App. 2a.

As a factual matter, we agree with the government that the inquiry whether a particular police encounter constitutes a "seizure" and the inquiry whether "consent" obtained during

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[9] Similarly, the only issue raised in the district court, and briefed and argued to the court of appeals, was consent.

that encounter is "voluntary" are often "related," Govt. Br. 32 n.5, particularly where the encounter is brief and essentially consists of requests for consent. Indeed, we argue below (Section II) as an alternative basis for affirmance that the factual record in this case supports a finding that respondents were illegally "seized."

As a legal matter, however, the issues are not the same. Whether a police encounter constitutes a "seizure" is a threshold inquiry that determines whether the Fourth Amendment is implicated at all, *i.e.*, whether the encounter is entirely outside the confines of the Fourth Amendment. The "voluntariness" inquiry comes into play when there is police conduct that plainly implicates the Fourth Amendment (such as the warrantless, suspicionless body searches in this case) and that is illegal absent valid consent. Here, the court of appeals held that respondents' Fourth Amendment rights were violated because they were subjected to warrantless, suspicionless body searches that were not supported by voluntary consent.

The distinction is important because the government spends much of its brief attacking the court of appeals' posited holding that respondents were "seized" and arguing that this holding "is contrary to this Court's precedents." Govt. Br. 23. But the government is fighting a straw man because the court of appeals did not hold that a "seizure" took place. For example, the government frames the issue as whether "*the interaction* between Officer Lang and respondents was consensual" and reviews this Court's case law addressing whether such encounters "implicate the Fourth Amendment," including decisions holding that law enforcement officers have broad leeway to approach citizens in a variety of settings and ask them questions without triggering Fourth Amendment scrutiny, assuming the citizen "consents" to the encounter by being willing to listen. *Id.* at 13-14 (emphasis added) (citing, *inter alia*, *Florida* v. *Rodriguez*, 469 U.S. 1 (1984) (per

curiam); *United States* v. *Mendenhall*, 446 U.S. 544 (1980); *Florida* v. *Royer*, 460 U.S. 491 (1983)).

The court of appeals did not address, however, whether the mere approach by the officers in this case, or the brief questioning that followed, or even the encounter in its entirety, constituted a "seizure" within the meaning of the Fourth Amendment. Accordingly, the decision below cannot be "contrary" to this Court's precedents according police officers broad leeway to approach citizens for the purpose of asking questions without implicating the Fourth Amendment.

Similarly, the government contends that the court of appeals "held that a seizure had occurred" because one of the officers "introduced himself to respondents," "showed respondents his badge," and "identified himself as a police officer," and then criticizes this purported holding as "effectively creating a per se rule" that officers must warn citizens of their right to refuse consent to search. *Id.* at 12-13; see also *id.* at 23. Again, however, the court of appeals did not hold that a seizure occurred in this case - either when the officers approached respondents and identified themselves or otherwise. Thus, it plainly did not decide that mere self-identification by police officers "convert[s] a consensual encounter into a seizure." *Id.* at 22.[10]

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[10] Nor did the court of appeals hold that mere self-identification by police officers renders consent to a search involuntary. Instead, the court of appeals merely addressed whether the passenger-specific show of authority *in this case* was a *factor* that contributed to a finding of coercion, and concluded that it was, because Lang's passenger-specific show of authority was not "less coercive" than a general bus-wide show of authority. Pet. App. 7a & n.5.

B. The Court Of Appeals Has Not Adopted A *Per Se* Advice Requirement; In Fact, It Has Repeatedly Rejected Such A Rule.

The government contends[11] that the court of appeals has adopted "a per se rule that officers must afford bus passengers *Miranda*-like warnings of their right to refuse consent before asking for permission to conduct a search." *Id.* at 12; see also *id.* at 28, 30. The government concedes, however, as it must, that the court of appeals has not *explicitly* adopted such a per se rule. See Reply Br. for the Petitioner in support of Pet. for Cert. at 8 ("The question here, however, is not whether the court of appeals has explicitly established a *de jure* warning requirement. It is instead whether the decision has the *effect* of requiring warnings") (emphasis in original). The government's position is that the opinion below, along with the *Washington* and *Guapi* opinions, "[c]ollectively" and "effectively" establish a warning requirement.[12] Govt. Br. 30; see also *id.* at 28. As we demonstrate below, that position is incorrect.

Further, the government has ignored both the actual text of the Eleventh Circuit decisions and their genealogy. The government seeks to eliminate factors which this Court has decided are relevant to the totality test. Thus, contrary to the totality test, the government's brief reads like a "reverse per se" argument, because it attempts to discount into obscurity relevant factors. For instance, because *INS* v. *Delgado*, 466 U.S. 210 (1984), upheld a search during which officers were stationed at the door does not mean, as the government suggests (Govt. Br. 25), that the fact there was an officer near

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[11] Contrary to its argument here, the government conceded to both the district court and the court of appeals that the Eleventh Circuit does *not* have a per se rule. *See supra* at 9.

[12] In the district court, the government characterized the facts in *Guapi* and *Washington* as "cattle call show[s] of force." J.A. 37 (Tr. 4).

the bus door here is no factor at all in the totality analysis of this case.[13]

1. The Court Of Appeals Did Not Expressly Adopt A Warning Requirement.

The government relies on a "collective[]" reading of the opinion below and the *Washington* and *Guapi* opinions because it is not possible to read any of the three opinions individually and come to the conclusion that the court of appeals has established a warning requirement. To the contrary, the court of appeals has expressly rejected such a warning requirement and properly examined the totality of the circumstances.[14]

In the decision below, the court of appeals did not even mention that the officers in this case did not inform Drayton and Brown of their right to refuse consent to search.[15] Accordingly, there is no discussion of what weight the court of appeals gave to this factor, if any, and certainly no discussion suggesting that this factor was dispositive.

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[13] Such logic was expressly rejected by this Court in *United States* v. *Arvizu*, 122 S. Ct. 744, 751-52 (2002), because the Ninth Circuit there had found that certain factors were entitled to no weight in the application of the totality test. The government takes the same approach regarding the on-bus locus of the search (*Bostick*) and the target's knowledge of the right to refuse consent (*Schneckloth*).

[14] The government did not seek review in this Court of the *Guapi* or *Washington* decisions. Apparently, when those decisions were issued, the government concluded that neither opinion individually established a warning requirement and that the two opinions collectively did not establish a warning requirement. *See* Reply Brief for the Petitioner in support of the Petition for Cert. at 5-6.

[15] The court of appeals only noted that there was no "reassurance" in this case, as in *Washington*, that the passengers were not under arrest. Pet. App. 7a. The *Drayton* Court had no reason to address the "reassurance" because it was made in the *Washington* case.

The government relies on the fact that the court of appeals held that this case is "controlled" by *United States* v. *Washington*, in which another panel concluded that a bus search violated the Fourth Amendment because "a reasonable person . . . would not have felt free to disregard [the agents'] requests without some positive indication that consent could have been refused." Pet. App. 5a-6a (quoting *Washington*, 151 F.3d 1354, 1357 (11th Cir. 1998)). As we explain below, this language from *Washington* does not suggest the establishment of a per se rule requiring warnings. Accordingly, the court of appeals' quotation of that language in the decision below does not suggest that the court of appeals endorses a warning requirement. To the contrary, the court of appeals expressly acknowledged in the decision below that *Washington* has been criticized as adopting a per se rule requiring warnings, *id.* at 2a n.2, stated that it "[did] not have any occasion to pass on that criticism," and "express[ed] no view concerning it." *Id.* *United States* v. *Washington* itself expressly rejected a per se requirement. 151 F.3d 1354, 1355, 1357 (11th Cir. 1998). Accordingly, there is nothing in the opinion below to suggest that the court of appeals adopted a per se rule requiring warnings.

Nor did the court of appeals adopt a per se rule requiring warnings in *Washington*. Instead, the *Washington* panel considered the totality of the facts and circumstances surrounding the bus search at issue and concluded that the police conduct violated the defendant's Fourth Amendment rights. The court of appeals there considered nine separate factors. *Id.* at 1355-57. The *Washington* panel repeatedly made clear that its ruling was based on all the specific facts and circumstances surrounding the police conduct in the case: "*[L]ooking at the circumstances of this case*, we feel that a reasonable person *in the defendant's position* would not have felt free to disregard [the agent's] requests without some positive indication that consent could have been refused." *Id.*

at 1357 (emphasis added).[16] Thus, it is clear the court of appeals properly decided *Washington* based on the totality of the circumstances rather than any per se rule.

The court of appeals' statement that a reasonable person in the defendant's position would not have felt free to disregard the officers' requests "without some positive indication that consent could have been refused," *id.*, does not indicate that the court of appeals gave this factor dispositive weight and thereby departed from a totality of the circumstances approach. The court of appeals concluded that, under the facts and circumstances of the case, the presence of such a "positive indication" would have tipped the balance in the government's favor. This conclusion is wholly consistent with this Court's recognition that the presence of advice is an important factor that supports the voluntariness of consent. *Florida* v. *Bostick*, 501 U.S. 429, 432 (1991) (the fact that police advised defendant of his right to refuse consent is "particularly worth noting"); *Florida* v. *Royer*, 460 U.S. 491, 504 (1983) (by advising a citizen of his right to refuse cooperation, the police can "obviate[] any claim that the encounter was anything but a consensual matter from start to finish"); *United States* v. *Mendenhall*, 446 U.S. 544, 558 (1980) ("it is especially significant that the respondent was twice expressly told that she was free to decline to consent to the search, and only thereafter expressly consented to it").[17]

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[16] *See also Washington*, 151 F.3d at 1355 ("*[T]he facts and circumstances of this search* required some indication to passengers that their cooperation was voluntary rather than mandatory") (emphasis added); *id.* at 1357 ("Without such notice [of the right to refuse consent] *in this case*, we do not feel a reasonable person would have felt able to decline the agents' requests") (emphasis added).

[17] The Fifth Circuit has similarly recognized that the practical effect of the police telling a citizen of his right to refuse to consent in the event the issue gets litigated "does in many instances assuage the fear of a court that an individual was intimidated into consent to a search." *United States* v. *Berry*, 670 F.2d 583, 597-98 (5th Cir. Unit B Mar. 1982) (en banc)

Accordingly, the *Washington* panel did not depart from a totality of the circumstances analysis and did not establish any warning requirement that would apply in future cases.

In addition, while "some positive indication that consent could have been refused" could have been the police officer telling Washington he had a right to refuse to consent, it does not necessarily mean the giving of such advice. "Some positive indication" could more broadly include any act or word sufficient to eliminate the coercive effects of the police officer's contact with Washington.

Similarly, the court of appeals did not adopt a per se rule requiring warnings in *United States* v. *Guapi*. As in *Washington*, the *Guapi* panel expressly rejected such a per se requirement: "[W]e reject the notion of a *per se* rule requiring bus passengers to be informed of their constitutional rights." 144 F.3d 1393, 1393 (11th Cir. 1998). "[W]e eschew the notion of a *per se* rule requiring bus passengers to be informed of their constitutional rights prior to a search." *Id.* at 1395. Moreover, the *Guapi* panel analyzed at least ten factors in support of its ruling, consistent with a proper totality analysis. *Id.* at 1396-97. Also as in *Washington*, the court of appeals expressly made a fact-specific ruling limited to the particular bus search at issue: "[*T*]*he facts and circumstances of this search* required some indication to passengers that their cooperation was voluntary rather than mandatory." *Id.* at 1393 (emphasis added); see also *id.* at 1395, 1397.[18]

(commending "DEA's salutary practice of informing individuals that they are free to refuse consent to a search"). This recognition has not, however, been enshrined in the Eleventh Circuit's constitutional dogma so that the absence of telling someone he can refuse to consent means the consent is involuntary. Rather, the Eleventh Circuit has exercised its constitutional responsibility to ensure that the government is held to its burden of proving that any consent given was indeed voluntary.

[18] Because the court of appeals considered all the relevant facts in this case, in *Washington*, and in *Guapi*, there can be no contention that the court of appeals improperly departed from a totality of the circumstances methodology by "categoriz[ing] certain factors relied upon by the District Court as simply out of bounds" or by "reject[ing]" factors "in isolation from each other." *Arvizu*, 122 S. Ct. at 748, 751.

2. The Court Of Appeals Did Not Tacitly Adopt A Warning Requirement.

The government also suggests that the court of appeals has tacitly adopted a per se warning requirement because it held that the bus searches in this case, in *Washington*, and in *Guapi* violated the Fourth Amendment. In particular, the government argues that "[i]f warnings are required in the innocuous circumstances of this case, it is difficult to imagine a situation in which they would not be necessary." Govt. Br. 30-31. See also *Washington*, 151 F.3d at 1358 (Black, J., dissenting) ("With this case as precedent, it is not clear that there will ever be any set of circumstances under which this Court can uphold a bus search if the officers do not inform the passengers of the right to refuse consent"). At bottom, the government suggests that the court of appeals has left police officers with no choice but to tell a passenger of his right to refuse to consent to a search request.

That suggestion is not correct. The court of appeals' recent bus search decisions, viewed individually or collectively, hardly limit police officers to any particular course of conduct. In each decision, the court of appeals identified several factors that, taken together, rendered the police conduct coercive, such as the blocking of the aisles in *Guapi*, the presence of an officer at the front of the bus in this case and *Guapi*, the specific wording of the police communications, and the officer's passenger-specific show of authority in this case. Accordingly, law enforcement officers can garner guidance as to the types of police conduct that will likely contribute to a finding of coercion. The government's argument that the police conduct in this case was "innocuous" is simply a factual disagreement with the Eleventh Circuit's conclusion that it was coercive.

Moreover, the court of appeals was under no obligation to provide examples of how law enforcement officers might constitutionally conduct bus searches, but several options readily come to mind. For example, they could approach passengers in the terminal. They could walk a drug dog through the terminal and thereby identify any passengers whose luggage or person presents a reasonable suspicion. They could stand with the drug dog as passengers reboard the bus. And they could, either in the terminal or on the bus, ask if any passengers are willing to *volunteer* themselves or their luggage for inspection. In our view, it would be quite reasonable for police officers to board a bus, identify themselves and announce to passengers that they are conducting drug and weapon interdiction, and advise that, if any passengers wish to *volunteer* to have their luggage searched, they can briefly exit the bus and meet them outside. This would ensure that any "consent" searches are truly "voluntary."[19]

3. The Court Of Appeals Correctly Analyzed The "Totality Of The Circumstances" In This And Prior Cases.

The court of appeals identified numerous facts supporting its decision, demonstrating that it properly based its ruling on the totality of the circumstances rather than any per se rule. The numerous facts discussed by the court of appeals include: (1) three officers boarded the bus, Pet. App. 3a; (2) the officers were casually dressed and no weapon was visible, *id.*; (3) the officers spoke to the passengers individually rather than by general announcement, *id.* at 3a, 6a; (4) one of the

[19] This is consistent with the definition of "voluntary," which is a willful act, something "brought about of one's own will," or "done by design or intention." *Webster's Ninth New Collegiate Dictionary* 1322 (1991). Similarly, *Black's Law Dictionary* 1413 (5th ed. 1979), defines "voluntary" in part as "unimpelled by another's influence; spontaneous; acting of one-self."

officers remained at the front of the bus, *id.* at 3a, 9a; (5) the officers did not block the aisle or interfere physically with the ability of the passengers to get off the bus, *id.* at 3a-4a; (6) Officer Lang's face was 12-18 inches from Drayton during the encounter, *id.* at 4a; (7) the officers' tone of voice, *id.*; (8) the officers' statements to the individual passengers, *id.*; (9) testimony concerning the infrequency with which bus passengers in other searches conducted by one of the officers had refused consent, *id.* at 4a, 8a; and (10) the bus passengers were not asked to display their tickets or photo identification, *id.* at 7a.

The court of appeals also engaged in a detailed comparison of the relevant factors in this case with those in *Washington*. In so doing, the court made several pertinent observations. *First*, the court of appeals rejected the government's argument that "a passenger-specific show of authority is any less coercive than a general bus-wide one." Pet. App. 7a. *Second*, the court of appeals concluded that "the failure to ask for [passengers' tickets or identification does not affect] whether other requests or commands are coercive." *Id.* *Third*, the court of appeals concluded that "six or seven refusals out of hundreds of requests is not very many." *Id.* at 8a. *Finally*, the court of appeals did not even address the absence of advice of the passengers' rights in this case. It noted only by comparison with *Washington*, where officers had opened their procedure with general advice that no one was under arrest, that no such "reassurance" was given in this case. *Id.*

The factors in the totality test are not meant to be considered mechanically – the totality of the circumstances analysis demands that the court get an overall sense of the police-citizen encounter. Once this Court reviews whether the Eleventh Circuit mined the relevant facts to achieve this overall sense, it becomes clear that the Eleventh Circuit applied a totality of the circumstances analysis, and therefore that this Court should affirm its ruling.

II. UNDER THE TOTALITY OF THE CIRCUMSTANCES, RESPONDENTS WERE SEIZED, BECAUSE A REASONABLE PERSON WOULD NOT HAVE FELT FREE TO IGNORE THE OFFICERS.

As respondents demonstrated above (Section I.A.), the court of appeals did not address whether respondents were "seized." Nevertheless, applying the totality of the circumstances test to the factors evidenced here, it is clear that respondents were seized. Accordingly, this Court can affirm the decision below on this alternative ground. *Dandridge* v. *Williams*, 397 U.S. 471, 475 n.6 (1970) ("[t]he prevailing party may, of course, assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court"); *Blum* v. *Bacon*, 457 U.S. 132, 137 n.5 (1982) (the prevailing party "may rely upon any matter appearing in the record in support of the judgment below").

A. Standard For Determining Seizure In Random Bus Search: "Free To Ignore."

In *Florida* v. *Bostick*, this Court established the test for determining whether a police-citizen encounter on a bus, not premised on the officer's probable cause or even reasonable suspicion of criminal wrongdoing, is consensual. 501 U.S. 429 (1991). If the encounter is consensual, the Fourth Amendment is not invoked. *Id.* at 434. If, however, the "'officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen,'" the encounter loses its consensual nature, and the citizen is at that point "seized" for Fourth Amendment purposes. *Id.* (quoting *Terry* v. *Ohio*, 392 U.S. 1, 19 n.16. (1968)).

The underlying assumption of *Terry* is that there is nothing wrong with an officer approaching a person in a public place and putting questions to him "if the person is willing to listen." *Florida* v. *Royer*, 460 U.S. 491, 497 (1983) (citing

Terry, 392 U.S. at 31, 32-33 (1968) (Harlan, J., concurring), and 34 (White, J., concurring)). "The person approached, however, need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way." *Id.* at 497-98. Adapting the *Chesternut* "free to leave" principle to bus interdictions, the *Bostick* Court determined that the proper inquiry "when the person is seated on a bus and has no desire to leave" is whether, under the totality of the circumstances, "a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter." *Bostick*, 501 U.S. at 435-36 (citing *Michigan* v. *Chesternut*, 486 U.S. 567, 573 (1988)). The test is grounded in a person's "'liberty *to ignore the police presence* and go about his business.'" *Id.* at 437 (quoting *Chesternut*, 486 U.S. at 569 (emphasis added)).

Therefore, rude or unpatriotic as such behavior might seem, a citizen must be free to completely ignore a police officer's approach and questioning without risking any negative consequences. If a citizen is not free to ignore the police, he is "seized" under the Fourth Amendment. Absent a governmental purpose which overrides citizens' interests in simply being left alone and traveling freely, the seizure will be illegal, and any evidence gained as a result will be suppressed as fruit of the illegal seizure. *Michigan Dep't of State Police* v. *Sitz*, 496 U.S. 444, 455 (1990); *Wong Sun* v. *United States*, 371 U.S. 471, 488 (1963). Because bus interdictions without reasonable suspicion are conducted for the "primary purpose" of "uncover[ing] evidence of ordinary criminal wrongdoing," the governmental interest must yield to the citizen's, and thus any "seizure" of a citizen will be illegal. *City of Indianapolis* v. *Edmond*, 531 U.S. 32, 42 (2000).

B. Application Of "Free To Ignore" Standard To The Totality Of The Circumstances In This Case.

Applying the totality of the circumstances analysis, the applicable factors demonstrate that respondents were seized. These factors include:

1. Respondents Were Not Advised Of Their Right Not To Engage In Any Encounter With The Officers, *i.e.*, To Ignore Them.

Whether a passenger was advised of his right not to engage in any encounter with the police, or to refuse a request to search, is one important factor in the totality of the circumstances analysis for determining whether a seizure occurred. *Bostick* regarded as "particularly worth noting" the fact that "police specifically advised Bostick that he had the right to refuse consent." 501 U.S. at 432; Govt. Br. 17. Although this factor is important, a citizen's knowledge of the right to ignore officers or to refuse consent has not been held to be an absolute prerequisite for a court to find voluntary consent. See *United States* v. *Mendenhall*, 446 U.S. 544, 558-59 (1980). Nevertheless, that factor appeared to be one of the primary distinctions between the dispositions in *Mendenhall* and *Royer*. Compare *Mendenhall*, 446 U.S. at 558-59 (finding no seizure occurred and noting, in discussion whether consent was coerced, that respondent explicitly consented to search only after she was "twice expressly told that she was free to decline to consent"), with *Royer*, 460 U.S. at 504 (finding an illegal detention while noting that, if the officers had "inform[ed Royer] that he was free to go if he so desired, the officers might have obviated any claim that the encounter was anything but a consensual matter from start to finish").

Advice as to the right to refuse consent is a particularly important factor in deciding whether a person has been seized in a random bus search. This includes both the right to refuse to engage in an encounter or conversation with the officer, as

well as the right to refuse to have luggage searched and the right to refuse to have your person frisked. However, there are psychological[20] and practical forces at work which render bus sweeps for the purpose of gaining consent a highly coercive environment. A passenger who does not wish to be either "engaged" or "searched" has no option but to try to ignore the officer or be rude to him. Given the officers' bag-matching procedure, *infra* at 34, a passenger's only alternative to having carry-on luggage considered "abandoned" and then searched is to respond to the officers' inquiries, *i.e.*, to engage in conversation with the officer. For these reasons, *Bostick* correctly concluded that this factor is "particularly worth noting." 501 U.S. at 432. Consequently, courts are correct to heavily weigh this factor.

In ruling that a citizen's knowledge of his right to refuse consent is not "the *sine qua non* of an effective consent," this Court has noted that "it would be thoroughly impractical to impose on the normal consent search the detailed requirements of an effective warning." *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 231-32 (1973) (observing that consent searches which occur "under informal and unstructured conditions" and "which may develop quickly . . . . are immeasurably far removed from 'custodial interrogation' where, in *Miranda* v. *Arizona*, we found that

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[20] *Miranda* warnings were developed to help dispel the psychological coercion inherent in custodial interrogations. *Miranda* v. *Arizona*, 384 U.S. 436, 448 (1966). Similarly, all but one of the factors the government cites here are psychologically oriented. Govt. Br. 17 (listing as the only non-psychological factor "whether [the agents] physically touched the citizen"). In *Bostick*, this Court noted that the "cramped confines of a bus are one relevant factor" in determining whether a passenger is "coerced to comply with a request that [he] would prefer to refuse." 501 U.S. at 438, 439. Underlying this recognition was the psychological orientation of the word "coerce." *See Webster's Ninth New Collegiate Dictionary* (1991) (noting the word derives from "arcére," Latin for "to enclose"). In its purest sense, then, "coercion" is a psychological concept which relates to spatial relationships between people in the context of their surroundings.

the Constitution required certain now familiar warnings as a prerequisite to police interrogation") (citations omitted). However, unlike the "unstructured" consent searches of *Schneckloth*, the Tallahassee Police Department's bus interdictions are routinized, scripted events. Govt. Br. 26 n.4; see also *United States* v. *Cuevas-Ceja*, 58 F. Supp. 2d 1175, 1179-80 & n.2 (D. Or. 1999) (recording the local police department's 18-point procedure for conducting bus interdictions). Lang acknowledged that giving notification would impose *no additional burden* on him and would take only *three to five seconds*.[21]

In sum, advice is an appropriate tool for smoothing the psychological terrain of on-bus police-citizen encounters. As such, it is properly an important factor in bus searches.

2. Locational Factors.

a. Bus Locus. In *Bostick*, this Court acknowledged that "where the encounter takes place is one factor, but it is not the only one" in considering all the circumstances surrounding a

[21] Thus, far from imposing an impractical burden on bus interdiction agents, as the government contends, Govt. Br. 33, consistent use of consent advice would be a boon for law enforcement. *See* Brief for the United States at 33, in *Dickerson* v. *United States*, 530 U.S. 428 (2000) (arguing that "compliance with *Miranda* helps ensure that statements will be found admissible because they were voluntary"). Similarly, administering consent warnings - when police choose to board buses with the intent of seeking consent for random searches - helps ensure that evidence gained from on-bus consent searches will be admissible in court. Also, just as "law enforcement officers and officials have well-assimilated the *Miranda* rules into their policies and procedures," Brief *Amici Curiae* of Americans for Effective Law Enforcement, et al. at 7, in *Dickerson* v. *United States*, 530 U.S. 428 (2000) (noting that, even when consent advice is not constitutionally required, good policy and practice may be to give them), many law enforcement agencies already train their officers to give consent advice prior to conducting any consent search. *Id.*; *see also The Law Enforcer's Pocket Manual* § 7-16-17; FBI, *Legal Handbook for Special Agents* § 5-4.5 (detailing procedures for administering consent warnings).

bus interdiction. 501 U.S. at 437; see Govt. Br. 16 (noting "[t]he location of the encounter" is a factor in determining whether a seizure occurred). As this Court has recognized, when the police question people in small spaces, the police presence is substantially more dominating than it would otherwise be if the police were to question people in a bus terminal or the bus parking lot. Cf. *Royer*, 460 U.S. at 502-03 (noting that transfer of Royer from airport concourse to a "small room - a large closet" caused "[w]hat had begun as a consensual inquiry in a public place [to] escalate[] into an investigatory procedure in a police interrogation room").

The relevance of this factor is highlighted by the statistics regarding the minimal number of bus passengers who refuse the police requests for consent (less than 1/100 of one percent). See also *United States* v. *Guapi*, 144 F.3d 1393, 1396 (11th Cir. 1998) (noting that, although officer testified he searched at least 28 buses per week, "he could only recall 'several times'" individuals refused search requests).

b. Officers Chose This Locus. This Court also noted that "Bostick's movements were "'confined'" in a sense, but it was the natural result of his decision to take the bus; it says nothing about whether or not the police conduct at issue was coercive." *Bostick*, 501 U.S. at 436. The government agrees "the location of the encounter" and "the timing of [the officers'] arrival" are two specific factors in the totality test. Govt. Br. 17.

In this case, respondents were on a stopover[22] and were required to exit the bus. Lang first observed respondents "inside the terminal" about Noon, and Lang and his partners also watched them reboard the bus. However, the officers did not begin the interdiction until about 12:40 p.m., 40 minutes

[22] Although not a significant factor, respondents' ability to decline an encounter may have been diminished because they were in unfamiliar territory where they did not enjoy the support network and comfort level one naturally develops in his home town.

after first seeing them and only five minutes before the bus' departure time. Unlike *Bostick*, the officers here had ample time to approach respondents in an open area (the terminal or outside the bus), but the officers chose instead to wait until they were in the confined space of a bus seat. Thus, the police deliberately chose to wait to seek respondents' consent until after they were in a vulnerable position – seated and confined in a small space, and where the police could most effectively establish an intimidating presence by standing over the seated respondents. See *Royer*, 460 U.S. at 496. Therefore, the record certainly suggests that Lang took advantage of the intimidating and coercive venue of the bus when choosing the place to engage respondents and request consent to search.

In *Royer*, *id.* at 509, this Court noted that police did not request consent to search Royer until he was relocated from a public airport concourse to a "police room" the size of a broom closet and that no legitimate law enforcement purposes "were furthered by removing Royer to the police room prior to the officers' attempt to gain his consent to a search of his luggage." If Lang had approached respondents in the terminal, where both he and respondents would be standing in an open space, respondents would have been much less likely to feel intimidated into giving Lang consent to search.

Because the officers intentionally waited until respondents were on the bus, and waited until the scheduled departure time had passed to approach them, these factors support the conclusion that respondents were impermissibly seized.

3. Officers' Show Of Authority To All Passengers.

a. Assumption of Control Over the Bus. The government agrees that "whether [the police] conveyed any type of threat" is a factor. Govt. Br. 17. The nuances of how this interdiction transpired are crucial to appreciating the scene from a passenger's perspective. The officers were

standing by as the passengers boarded, were granted control of the bus by the driver, and began their questioning only after the passengers were settled. From a reasonable passenger's perspective, the image of multiple unticketed men boarding the bus en masse, one of whom stations himself in the bus driver's seat and starts watching them, must have seemed at the least confusing and intimidating. This procedure conveyed to passengers the true nature of the bus interdiction – that control of the bus had been turned over to these officers – and passengers had every reason to believe the bus was not going to leave until the officers finished whatever they came to do.

Beginning the interdiction process five minutes before the scheduled departure time, as the officers did here, when it generally takes at least 15-20 minutes, virtually guaranteed the bus would be delayed, which would have impermissibly detained all the passengers from their free travels. Once a bus interdiction passes from a pre-departure procedure to a departure-delaying exercise, the business of the passengers changes from waiting for departure to progressing to their destination. Officers blocking the bus' progress necessarily "seize" all the passengers, and *Bostick* and *Royer* instruct that a finding of probable cause or reasonable suspicion is necessary to legitimize the police presence on the bus which keeps passengers from going about their business of traveling.

The concept of actual, physical detention – or submission to an assertion of legal authority having that effect – has been a bright line defining seizures triggering Fourth Amendment scrutiny. *Terry* v. *Ohio*, 392 U.S. 1, 19 n.16 (1968); *California* v. *Hodari D.*, 499 U.S. 621, 626 (1991). See *Michigan* v. *Chesternut*, 486 U.S. 567, 574-75 (1988) (finding "an attempt to capture or otherwise intrude upon respondent's freedom of movement" defines the frontier between consensual encounters and attempted seizures). Like *Delgado*'s factory workers, respondents' freedom was "meaningfully restricted," 466 U.S. 210, 218 (1984); unlike

those factory workers, however, respondents were "seized" to the extent the officers' actions delayed their bus.[23]

b. Number and Positioning of Officers. "[W]hether there was a threatening number of officers" is another factor recognized by the government. Govt. Br. 17. Upon boarding, Hoover knelt in the driver's seat, studying the passengers' reactions, while Lang and Blackburn proceeded to the back of the bus and began working as a team. After Blackburn searched the rearmost passenger with Lang watching, Lang began working forward while Blackburn observed and assisted. The presence of three officers on the bus, strategically located to effectively surround the passengers, presents a threatening posture for passengers on a bus, and the Eleventh Circuit was correct to note that this factor "cuts in

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[23] Several federal courts have recognized that a police-imposed delay of a bus' departure would implicate the Fourth Amendment. Shortly after *Bostick*, the Ninth Circuit highlighted the distinction between bus interdictions which engender delay and those which do not. *See United States* v. *Gonzales*, 979 F. 2d 711, 713 (9th Cir. 1992) (finding no seizure where officer boarded bus at red light and conducted consent searches *on the moving bus* because no passengers were "prevent[ed] . . . from going on their way"); *United States* v. *Flowers*, 912 F. 2d. 707, 711 (4th Cir. 1990). *Accord United States* v. *Rembert*, 694 F. Supp. 163, 175 (W.D. N.C. 1988); *United States* v. *Fields*, 909 F. 2d. 470, 474 n.2 (11th Cir. 1990). *See also United States* v. *Barrett*, 976 F. Supp. 1105, 1108 (N.D. Ohio 1997). Likewise, the roadblock detention cases this Court has considered are analytically analogous. *Compare United States* v. *Martinez-Fuerte*, 428 U.S. 543, 556 (1976) (the parties stipulated, and this Court agreed, the brief checkpoint stops to detect illegal aliens were "'seizures'"); *Sitz*, 496 U.S. at 448 (sobriety checkpoint stops delaying motorists an average 25 seconds were "seizures" made absent reasonable suspicion); and *Indianapolis* v. *Edmond*, 531 U.S. 32, 35, 42 (2000) (concluding that cars stopped an average "two to three minutes or less" at narcotics checkpoints were "seized" and ruling the brief detentions unconstitutional because "primary purpose" was "to uncover evidence of ordinary criminal wrongdoing"). Because roadblocks and departure-delaying bus interdictions are nonconsensual, both produce Fourth Amendment seizures.

the defendants' favor." Pet. App. 9a. The court reasoned rightly that "[s]eeing an officer stationed at the bus exit during a police interdiction might make a reasonable person feel less free to leave the bus." *Id.*

The government views the Eleventh Circuit's weighing of this factor as being "directly at odds with this Court's decisions." Govt. Br. 25. The government cites *Delgado* for the proposition that placing an officer near an exit "should not have resulted in any reasonable apprehension by any [employees] that they would be seized or detained in any meaningful way." *Id.* at 25-26.[24] Unlike Delgado, however, who was free to move about a large factory and who even passed unquestioned through factory doors during the INS sweep, respondents were not free to ignore the officers. Therefore, in this situation, the officer stationed near the exit, given that passengers were not *told* they were free to leave, is a relevant factor which weighs in favor of finding a seizure.

c. Officers' Appearance and Demeanor. Certainly the officers' plain clothes, quiet tone, and polite demeanor appear to weigh against finding a seizure. However, other factors weigh heavily in favor of a seizure finding. Though there is no evidence any passenger saw the officers' weapons in side holsters, people expect officers to carry guns. Likewise, although Lang testified their handcuffs were covered, the passengers, including Drayton, certainly saw them once Brown was arrested. Similarly, the passengers saw their displayed badges.

d. Officers Constructively Blocked the Aisle. The Eleventh Circuit noted that the officers "did not block the aisle, but instead stood next to or behind the passengers with

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[24] *Delgado* is also distinguished by the fact that it involved a search based on a warrant. 466 U.S. at 212.

whom they were talking." Pet. App. 3a.[25] In the bus interdiction analysis which operates on the "free to leave" principle drawn from *Mendenhall* and *Chestermut,* whether officers actually blocked the aisle might signal whether "a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter." *Bostick*, 501 U.S. at 436. The government makes much of Lang's testimony that passengers "'often exited the bus while officers were on it.'" Govt. Br. 26. However, that testimony relates to his general procedure; there was no testimony that anyone exited that day. Lang also acknowledged that he would have to step aside to let someone pass in the narrow aisle. This factor, then, weighs in respondents' favor.

4. Officers' Specific Show Of Authority To Drayton And Brown.

a. Officers Presented Their Badges. Given the locational factors and the officers' show of authority to all passengers detailed above, the Eleventh Circuit "[did] not believe that a passenger-specific show of authority [was] any less coercive than a general bus-wide one." Pet. App. 7a. Indeed, it was argued below that it was *more* coercive. J.A. 119 (Tr. 92); Drayton's Br. at 33. See *infra* at 36 n.29. The court of appeals noted the authoritativeness of Lang when he

[25] Though Lang was careful not to block the aisle, his testimony reflects there was a drug dog at the scene. He did not indicate where the dog was during this interdiction. If the drug dog was positioned outside the bus door, and with Hoover remaining "outside" the bus door (as Lang appeared to testify at trial), that option was eliminated. The dog's presence would have served to leverage Lang's vague suspicions by forcing respondents to either engage in an encounter they would rather avoid or risk passing an intimidating dog. *See, e.g., Barrett*, 976 F. Supp. at 1110 (finding defendant likely consented because of drug dog outside the bus: "[b]y detaining the defendant and putting him involuntarily to the choice between allowing the officer to search his bag or possibly having it checked by a dog, [the officer] successfully, but improperly, exploited the primary unlawfulness of the detention").

approached Drayton and Brown, and "with his badge held up in his hand, leaned over with his face 12 to 18 inches from Drayton's, and told the defendants that he was conducting a bus interdiction, looking for drugs and illegal weapons." Pet. App. 7a.[26] The effect was not simply to inform respondents,[27]

[26] Research demonstrates the ways, psychologically speaking, people can be induced to behave in a manner contrary to their own best interests - in this setting, to say "yes" when what they really want to do is "just say no." The overall answer lies in the simple yet compelling power of the situation. First, research into the behavioral consequences of interpersonal distances (proxemics) defines eight such distances and indicates the behavior considered appropriate for each one. E.T. Hall, *The Silent Language* (1959). A distance of 6 to 18 inches constitutes intimate distance, a distance reserved for people with whom we feel intimate. Moreover, this distance falls within the imaginary "bubble" that is the boundary for personal space. R. Sommer, *Personal Space: The Behavioral Basis of Design* (1969).

The social implication of a stranger suddenly moving into that range creates emotional distress, physiological reactions, and felt loss of control. Hall, *supra*; Sommer, *supra*. Thus, an officer who leans in with his face less than 18 inches away from the subject will reduce the subject's felt independence, regardless of what is said, and this is especially true in the confined environment of a bus, where another officer is standing adjacent to the first, and particularly where the seating arrangement prevents the normal response of backing up to withdraw from the invasion. While we all acquire much of this knowledge through normal social interactions, *e.g.*, being in a crowded elevator or choosing a seat in an almost-empty room, law enforcement officers are all trained in the ways in which cooperation can more quickly be obtained. *See supra* at 6 n.7. F.E. Inbau et al., *Criminal Interrogation and Confessions* (3d ed. 1986).

[27] Contrary to the government's contention that this "reassures the citizen that he is communicating with the police," Govt. Br. 12, it strains credulity that, several minutes into the interdiction, with three officers stationed throughout the bus exploring passengers' bags, and passengers waiting on the bus to depart, any passenger on that bus did not realize Lang was a police officer. The government makes much of the district court's incredible observation that the officers "'could have been mistaken for other passengers,'" thus arguing that Lang had to identify himself and show his badge. *Id.* at 18. If Lang's introduction of himself as an officer is not a "show of authority" because people would not know he was an

as the government argues, but also to reinforce Lang's authority over them.

b. Proximity of the Officer to Drayton and Brown. The government notes that the "officers' proximity to the citizen" is a factor to be considered. Govt. Br. 17. This factor, too, must weigh towards finding an illegal seizure here. From a distance of only 12-18 inches, Lang places his "total focus" on the individual passenger. This proximity to and "total focus" from a complete stranger would make most people extremely uncomfortable and strongly supports a finding that respondents had been "seized" at that point.

c. Officers' Practice of Bag-matching. The passengers were forced to interact with Lang due to his practice of matching carry-on luggage with individual passengers. A reasonable person subject to this procedure would realize he faced only two options – engage Lang and identify his carry-on luggage or risk having Lang remove and search it as "abandoned property." See, *e.g.*, *United States* v. *Sanders*, 130 F.3d 1316, 1317-18 (8th Cir. 1997) (holding that luggage unclaimed in bus interdiction was "abandoned" and subject to search); see also *United States* v. *Edmondson*, No. 3:01-M-0403-HTS (M.D. Fla. 2001) (noting that, after officers claimed bags as "abandoned" and passenger exited the bus, he was pursued and arrested).[28] This Court has noted the private nature of many items passengers carry with them while traveling. Lang's bag-matching procedure is especially distasteful because it forced passengers to affirmatively

officer, it would also follow that the fact that people leave the bus daily while he is conducting searches is irrelevant because they would likely not know he is an officer; the observation would prove nothing about whether passengers feel free to deboard during a bus sweep. In any event, the district court was equivocal about this finding and ultimately determined it made no difference. J.A. 130 (Tr. 105).

[28] Note this is similar to the treatment of passengers' bags noted in *Guapi* and *Washington*. *See Guapi*, 144 F.3d at 1394; *United States* v. *Washington*, 151 F.3d 1354, 1355 (11th Cir. 1998).

protect their carry-on luggage from police probing. See *Bond* v. *United States*, 529 U.S. 334, 337-38 (2000) (noting in the context of a bus sweep that "travelers are particularly concerned about their carry-on luggage; they generally use it to transport personal items that, for whatever reason, they prefer to keep close at hand"); see also *Sitz*, 496 U.S. at 465 (Stevens, J.,dissenting) ("Unwanted attention from the local police need not be less discomforting simply because one's secrets are not the stuff of criminal prosecutions").

Thus, ignoring Lang's presence was not an option. Contrary to this Court's teaching in *Delgado*, the passengers here had no alternative but to engage in an encounter with Lang. 466 U.S. at 218 (instructing that agents could not lawfully detain employees who "simply refused to answer" agents' questions). This bag-matching procedure, then, violated this Court's dictate that "police [may] not convey a message that compliance with their requests is required." *Bostick*, 501 U.S. at 435.

d. Officers' Commanding Language Conveyed an Expectation of Cooperation. The government cites as another factor "whether [the officers] used authoritative language or a tone of voice showing that compliance is required." Govt. Br. 17. The government considers Lang's "temperament and demeanor" on the witness stand to be probative evidence to establish that he did not use an authoritative tone of voice on the bus. *Id.* at 19. However, the record reflects that the volume of voice with which Lang addressed Drayton from a distance of 12 to 18 inches carried a "considerable distance" through the courtroom. Even if Lang were talking at a normal volume, it likely would be perceived by a reasonable person as intimidating when delivered from a stranger standing above him and at a very close distance.

The language Lang used during the interdiction indicates that he was intent on eliciting "consent" from passengers.[29] Lang's introduction was authoritative and purposeful:

> I'm Investigator Lang with the Tallahassee Police Department. We're conducting bus interdiction, attempting to deter drugs and illegal weapons being transported on the bus. We would like for your cooperation. Do you have any bags on the bus?

J.A. 82 (Tr. 52). Nothing in this introduction suggests that the interaction was consensual.[30] Lang said who he was, what

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[29] French and Raven have identified five bases of social power. J.R.P. French, Jr. & B. Raven, *The Bases of Social Power, in Studies in Social Power* 150 (D. Cartwright ed., 1959). Two of these, *legitimate power* and *coercive power*, are integral to law enforcement. Raven and French, *supra*. Here, also, the bus driver transferred to the officers his recognized *legitimate* authority over the bus: "It's all yours," and the officer in his seat assumed that role in the minds of the passengers. *See also* S. Milgram, *Behavioral Study of Obedience*, 67 J. Abnormal & Soc. Psychol. 371 (1963); S. Milgram, *Obedience to Authority: An Experimental View* 18-21 (1974); Thomas Blass, *Understanding Behavior in the Milgram Obedience Experiment: The Role of Personality, Situations, and Their Interactions*, 60 J. Personality & Soc. Psychol. 398, 409 (1991). For this reason, "very few people, if any, feel comfortable refusing a police request, even when the encounter is otherwise perceived as friendly." Adrian J. Barrio, Note, *Rethinking Schneckloth v. Bustamonte: Incorporating Obedience Theory into the Supreme Court's Conception of Voluntary Consent*, 1997 U. Ill. L. Rev. 215, 216; *see also* Dennis J. Callahan, Note, *The Long Distance Remand: Florida v. Bostick and the Re-Awakened Bus Search Battlefront in the War on Drugs*, 43 Wm. & Mary L. Rev. 365, 408-09 (2001). *See also* M. Zachary, *Supreme Court Revisits Searches Of Bus Passengers*, 2002 Lawyers Weekly USA 229 (Apr. 1, 2001).

[30] A passenger-specific show of authority is, if anything, more coercive than a general announcement by officers to all passengers when they board the bus. Although the passengers undoubtedly knew the men were police officers, and although respondents likely overheard them talking to the three men behind him, having a large police officer suddenly pop over your shoulder, within 12-18 inches of your face, holding up his badge and

he was doing, and then immediately asked whether respondents had any bags on the bus. Not only did Lang not advise respondents that they did not have to consent to the encounter, Lang never even asked respondents if they wanted to engage in an encounter. He *assumed* cooperation.

> Q. [Mr. Blow]: You went straight in from one end to the other. There was never a question, 'Will you cooperate?' was there, sir?
>
> A. [Inv. Lang]: No sir.
>
> Q. So you expressed your desire to have their cooperation and then immediately ask, May I search your person, or search your bags?
>
> A. I was immediately given permission.

J.A. 94 (Tr. 64-65).

Lang told the passengers what he was "going to do" and acknowledged that, when he purportedly "asked" for consent, he did not wait on an answer. Of course, the irrelevance of the passenger's response or "consent" is most apparent in Drayton's case; in spite of the fact that Drayton said *not one word* to the officer, the officer proceeded to do what he was "going to do," which was frisk. Consent or lack thereof was irrelevant.[31] See *Terry*, 392 U.S. at 16 (noting that police there forced the defendant to engage with them, thereby seizing him). Second, Lang agreed with the assessment of the district court that his style was "in your face" and

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communicating that he expects your cooperation, would not allow a passenger any time to rationally process whether the passenger *wanted* to talk or whether there were any options but "cooperation." At least with an announcement from the front of the bus, followed by approaches to individuals, the passengers have a chance to *think* about how to respond.

[31] This explains why the court of appeals addressed only the coerciveness of the environment in which the encounter occurred, making it unnecessary to address the specifics of their alleged "consents" or the distinctions between Brown's verbal responses and Drayton's silence.

acknowledged that he held up his badge "to show he was the authority." The unambiguous message from Lang's authoritative language and manner was that he expected "cooperation" and that it would result in "consent" to search both Brown's bag and respondents' persons.[32]

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[32] Consistent with the prosecutor's explanation of Lang's method, *see supra* at 6 n.7, studies into "phased commitment" demonstrate that compliance can often be obtained, even without overt coercion. In the present setting, such phased commitment would have begun with the officer asking the subject a simple, seemingly innocuous request, and then gradually asking the subject more intrusive requests. This method is effective because, once the subject has agreed to even the first step (*e.g.*, just responding verbally to the officer), it becomes more difficult at each later stage to change the agreeable response to a negative one. *See, e.g.*, L. Festinger & J. M. Carlsmith, *Cognitive Consequences of Forced Compliance*, 58 J. Abnormal & So. Psychol. 203 (1959); J.L. Freedman & S.C. Fraser, *Compliance Without Pressure: The Foot-In-The-Door Technique*, 4 J. Personality & Soc. Psychol. 195 (1966); J. Dillard, *The current status of research on sequenial-request compliance techniques* 17 Personality & Soc. Psychol. Bull. 283 (1991); J. M. Burger, *The foot-in-the-door compliance procedure: A multiple process analysis and review*, 3 Personality & Soc. Psychol. Rev. 303 (1999). Given the prosecutor's argument, it appears clear that Lang's style is not accidental but rather based on such knowledge.

Finally, research into "scripted conformity" establishes that many social interactions, *e.g.*, routine etiquette, are engaged in without the subject actually *thinking* about what he or she is doing – *i.e.*, a certain *mindlessness*. *See, e.g.*, R.C. Schank & R. P. Abelson, *Scripts, plans, goals, and understanding* (1977); E. J. Langer, *Rethinking the role of thought in social interaction, in* 2 *New Directions in Attribution Research* 36 (J. H. Harvey et al. eds., 1978). Thus, if an officer gives a subject what *sounds like a reason*, compliance is more likely. In this way, Lang's request to check Brown "for weapons" would distract attention away from the true object of his search, which was drugs. After all, this was a drug interdiction team.

The same can be said of the coercive social pressure, especially in a crowded group of people, to "cooperate" when other passengers have already demonstrated that is the proper response to the situation. In that situation, it becomes even more difficult for one person to suddenly say "no." In this regard, Lang's explanation that, when people do refuse, they

The best test of the coerciveness – or not – of this encounter is whether a reasonable passenger would react any differently to the same behavior by a fellow traveler. Viewed in that light, the coerciveness of this encounter is clear. At some point very early in the officer's intrusion, *but for the officer's authority*, a reasonable person would have told a total stranger to "back off." This was one of the most highly intrusive types of searches imaginable – the frisk of a citizen's groin area. If manual manipulation of a passenger's carry-on bag is intrusive, *Bond*, 529 U.S. at 337-38, body frisks of the groin area are substantially more invasive and intrusive. There is nothing worse that could be done to a passenger in a public place.

e. Officer's Physical Touching and Confinement of Drayton. Brown, in the window seat, was the first man Lang searched, and to do so he had to lean across Drayton's body. Common sense indicates it would have been impossible for Lang to accomplish his extensive search of Brown without "touching" Drayton in the aisle seat.[33] Even if it were conceivable to do this without touching Drayton, it is indisputable that Drayton could not move – that is, he was completely restrained physically – once Lang started leaning across him. Not only could he not "ignore" an officer in this position, he certainly could not have gotten up and left the bus.

In *Brower* v. *County of Inyo*, this Court addressed the element of physical control in determining whether a seizure occurs in a given case. 489 U.S. 593 (1989). This Court reasoned "that a Fourth Amendment seizure does not occur

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are somewhat confrontational, suggests that it is necessary for passengers, or they *feel* it is necessary, to be confrontational to effectively communicate that they do not wish to be searched or have their bags searched.

[33] Drayton and Brown were neither tall nor skinny. Drayton was five feet and nine inches tall and weighed 190 pounds; Brown was five feet and seven inches tall and weighed 198 pounds. Def. Ex. 1, at 2.

whenever there is a governmentally caused termination of an individual's freedom of movement . . ., nor even whenever there is a governmentally caused and *desired* termination of movement . . ., but only when there is a governmental termination of movement *through means intentionally applied.*" *Id.* at 596-97. Here, there can be no doubt that Lang, reaching across Drayton in the cramped confines of the bus seats, placed Drayton under his physical control. Under his authority as a law enforcement officer, Lang, admittedly without reasonable suspicion, placed Drayton under his physical control, thus "seizing" Drayton for Fourth Amendment purposes.

f. Brown's Arrest. Of course, Brown's arrest presented the classic "show of authority" to Drayton.

III. THE ELEVENTH CIRCUIT CORRECTLY HELD THAT, UNDER THE TOTALITY OF THE CIRCUMSTANCES, RESPONDENTS DID NOT VOLUNTARILY CONSENT TO THE SEARCHES OF THEIR PERSONS.

It is well-settled law that consent to search given as a result of police coercion is not consent at all. See *Bumper* v. *North Carolina*, 391 U.S. 543, 550 (1968). When the government "seeks to rely upon consent to justify the lawfulness of a search, [it] has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority." *Id.* at 548-49 (footnote omitted). This Court has long recognized that police coercion comes in both overt and more subtle forms. As this Court said, over one hundred years ago, in considering when a search is unreasonable under the Fourth Amendment:

> It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.

Boyd v. *United States*, 116 U.S. 616, 635 (1886); see also *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 228 (1973) ("no matter how subtly the coercion was applied, the resulting 'consent' would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed").

The same factors which established that respondents were seized, plus the additional factor of their responses to Lang, demonstrate that they did not give voluntary consent. Respondents summarize them briefly.

A. Cramped Confines Of Bus.

"The cramped confines of a bus are one relevant factor that should be considered in evaluating whether a passenger's consent is voluntary." *Florida* v. *Bostick*, 501 U.S. 429, 439 (1991). The coercive environment of the cramped confines of the bus was compounded by the manner in which Lang spoke to respondents – employing an "in your face style," towering over and leaning within 12 to 18 inches of Drayton's face. Lang used this to his advantage, eliminating any opportunity respondents might have had to refuse consent.

B. Passengers' Responses.

Several aspects of the respondents' behavior deserve comment. Brown was asked, "Do you mind if I check your

person for weapons?" The phrasing of this indirect question[34] is conveniently such that, no matter how the subject answers, it can be interpreted by the testifying officer as affirmative consent. That is, if Brown had said, "Yes," it could be interpreted as "Yes, you may check me for weapons." Conversely, if he had answered, "No," it could be interpreted as "No, I don't mind."

Also, the answer Brown reportedly gave, "Sure," is a response entirely dependent upon intonation for interpretation.[35] The government's brief states that Brown said, "yes," Govt. Br. 18. That is wrong.

Unlike Brown, Drayton never responded verbally to the officer. His only reported response was to lift his hands off his lap. That act is consistent with his simply getting out of Lang's way – given that Lang testified he asked for permission and then proceeded, without waiting on an

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[34] Psycholinguistic research has demonstrated that the manner in which indirect requests are interpreted depends on the context. *See, e.g.*, H.H. Clark, *Responding to indirect speech acts*, 11 Cognitive Psychol. 430 (1979); R.W. Gibbs, *Do people always process the literal meaning of indirect requests?* 9 J. Experimental Psychol.: Learning, Memory, & Cognition 524 (1983); T. Holtgraves, *Communication in context: Effects of speaker status on the comprehension of indirect requests*, 20 J. Experimental Psychol.: Learning, Memory, & Cognition 1205 (1994); S.D. Kelly et al., *Offering a hand to pragmatic understanding: The role of speech and gesture in comprehension and memory*, 40 J. Memory & Language 577 (1999). A conventional expression like "Do you mind if I check your bag?" is normally interpreted as an indirect request requiring a "yes" response (in this case: "give me permission to search your bag"), rather than as a question about the addressee's willingness to give permission; this is evidenced by the fact that an expression like "Do you mind if I borrow your pencil?" is often uttered by someone who is already holding or using the pencil.

[35] *See* D.L. Bolinger, *Intonation and its uses: melody in grammar and discourse* (1989).

answer – as it is with an indication of permission.[36] This was, at best, "no more than acquiescence to a claim of lawful authority." *Bumper*, 391 U.S. at 549. Under the circumstances, Drayton did everything "reasonable" to ignore the officer, as it would be unreasonable, and unwise, to expect citizens to become confrontative with an officer to communicate that they wish to be left alone. See also *United States* v. *Berry*, 670 F.2d 583, 596 (5th Cir. Unit B Mar. 1982) (stating that acquiescence to an officer's demands cannot, of course, substitute for free consent). See *supra* at 3 n.4.

C. Any Consent Can Not Overcome The Taint Of The Illegal Seizures.

The government argues that "a defendant who has been 'seized' may nonetheless voluntarily and validly consent to a search." Govt. Br. 32 n.5. This assumes, however, that the seizure itself is a legal seizure. The government is incorrect in suggesting that respondents' purported consents could be voluntary even if they were "seized" during this encounter. *Any* seizure of respondents in this case was *unconstitutional* because the officers did not have a warrant, probable cause, or reasonable suspicion. When a seizure is unconstitutional, any "consent" to search obtained as a fruit of that illegal seizure is tainted and involuntary. *Bostick*, 501 U.S. at 433-34; *Florida* v. *Royer*, 460 U.S. 491, 507-08 (1983) ("Because we affirm the Florida District Court of Appeal's conclusion that Royer

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[36] Attribution studies also reflect that a nonactor is more likely to conclude that an actor's behavior was voluntary rather than the product of situational pressures. *See* Lee Ross, *The Intuitive Psychologist and His Shortcomings: Distortions in the Attribution Process, in Advances in Experimental Social Psychology* 173, 184 (Leonard Berkowitz ed., 1977) (finding that observers consistently "assumed that the particular subject's obedience reflected his distinguishing personal dispositions rather than the potency of situational pressures and constraints acting upon all subjects"); *see also* Dorothy Kagehiro, *Perceived Voluntariness of Consent to Warrantless Police Searches* 18 J. Applied Soc. Psychol. 38, 40 (1981).

was being illegally detained when he consented to the search of his luggage, we agree that the consent was tainted by the illegality and was ineffective to justify the search."); cf. *United States* v. *Mendenhall*, 446 U.S. 544, 558 (1980) (because there was no impermissible seizure, "it cannot be contended that [Mendenhall's] apparent consent to the subsequent search was infected by an unlawful detention"). See also *Bostick*, 501 U.S. at 433-34 (recognizing that, in a continuous narcotics interdiction on a bus, no attenuation exists between the impermissible seizure and the subsequent grant of consent to search that could possibly cure the antecedent Fourth Amendment violation); *Wong Sun* v. *United States*, 371 U.S. 471, 488 (1963) (focusing the admissibility of evidence on whether its seizure was sufficiently attenuated to be purged of the antecedent illegality).

The conclusion the government urges – that a voluntary consent can cure a coincident illegal seizure – would reduce the Fourth Amendment to a dead letter. Such an approach has been soundly rejected in the context of the Fifth Amendment. See *Brown* v. *Illinois*, 422 U.S. 590, 605 (1975) (holding the administration of *Miranda* warnings alone to be insufficient attenuation to purge the taint of an unconstitutional arrest). Under the Fourth Amendment regime the government urges, the police could physically detain people on the street and ask for permission to conduct a search. If the detainees were determined to have voluntarily consented to the search, despite the blatantly unlawful seizure, whatever evidence of wrongdoing the police gathered from the random detention would be admissible in a court of law.

The case cited by the government, *United States* v. *Watson*, 423 U.S. 411 (1976), is not to the contrary. In *Watson*, this Court held that Watson's arrest was *constitutional* under the Fourth Amendment because it was supported by probable cause and made in accordance with governing statutes. *Id.* at 415, 424. The Court therefore concluded that "Watson's

consent to the search of his car was not the product of an illegal arrest." *Id.* at 424.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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No. 01-631

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

CHRISTOPHER DRAYTON AND CLIFTON BROWN, JR.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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Respondents do not seriously dispute that, on the facts actually found by the district court and accepted by the court of appeals, they were not seized. Instead, respondents defend the judgment below by asserting new facts—facts that respondents never pressed in the district court, that are not supported by the record before that court, and that formed no part of the court of appeals' decision in this case. To the extent respondents rely on the actual facts found by the courts below, their argument largely reduces to the claim that *every* police-citizen interaction on a bus is inherently coercive and thus constitutes a seizure absent warnings of the right to refuse consent. That claim cannot be sustained.

I. The Court Of Appeals Effectively Established A Per Se Rule That Bus Passengers Are Seized Absent A Warning Of The Right To Refuse Cooperation

A. Respondents begin (Br. 10-13) by attempting to reframe the issue before the Court. The court of appeals, respondents contend, did not address whether they had been "seized" within the meaning of the Fourth Amendment and *Florida* v. *Bostick*, 501 U.S. 429 (1991). Instead, respondents assert that the judgment below rests on the conclusion that

their consent to the search was "involuntary" within the meaning of *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973).

That contention lacks merit. In *Bostick*, this Court addressed the validity of a bus passenger's consent to a search, framing the question before it as whether the interaction between the officer and the passenger was a "seizure." 501 U.S. at 433. The Court held that the police do not seize bus passengers by approaching them, asking for identification, and requesting consent to search, absent "police conduct [that] would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter." *Id.* at 439. The test is an objective one and presupposes a reasonable innocent person. *Id.* at 438. Respondents do not dispute that, in this case, the court of appeals applied the *Bostick* standard, asking whether "the facts and circumstances surrounding the search indicated that 'a reasonable person . . . would not have felt free to disregard [the agents'] requests." Pet. App. 6a (quoting *United States* v. *Washington*, 151 F.3d 1354, 1357 (11th Cir. 1998) (quoting *Bostick*, 501 U.S. at 439)). The court of appeals did not even allude to the voluntariness formula established in *Bustamonte*, which requires courts to ask whether the citizen's "will has been overborne and his capacity for self-determination critically impaired," 412 U.S. at 225. Indeed, the court of appeals refused to consider respondents' individual characteristics, such as their age, education, and law-enforcement experience—factors that, under *Bustamonte*, are ordinarily relevant in determining voluntariness, 412 U.S. at 226—because the *Bostick* seizure test "is an objective one." Pet. App. 8a n.6 (citing *Bostick*, 501 U.S. at 438). Finally, respondents do not deny that they urged the court of appeals to apply the *Bostick* seizure standard. See Brown C.A. Br. 25-27, 35.

Respondents thus do not dispute that this Court's decision should turn on an application of the *Bostick* standard, *i.e.*, on whether the "police conduct would have communicated to a reasonable person that the person was not free to decline the

officers' requests or otherwise terminate the encounter." 501 U.S. at 439. Respondents merely attach a different legal label ("voluntariness" rather than "seizure") to that inquiry. Respondents, moreover, offer no reason to think that applying the "voluntariness" rather than "seizure" label makes a difference in this case. If an officer "communicates the message" that a passenger is not permitted to decline his requests—thus seizing him under *Bostick*—the passenger's consent is not voluntary.

Respondents' sole basis for asserting that the court of appeals found involuntariness and not a seizure is the court's description of its inquiry as bearing on "whether the consent given by each defendant for the search was 'uncoerced and legally voluntary.'" Pet. App. 2a. This Court's decision in *Bostick*, however, at times frames the seizure issue similarly. See, *e.g.*, *Bostick*, 501 U.S. at 439 (explaining that the location of the encounter is "one relevant factor that should be considered in evaluating whether a passenger's consent is voluntary"). Indeed, the Court emphasized that consent validates a search "*only* if the cooperation is voluntary. 'Consent' that is the product of official intimidation or harassment is not consent at all." *Id.* at 438. And the Court specified that the issue "on remand [was] whether Bostick chose to permit the search." *Ibid.* Yet *Bostick* is unquestionably a *seizure* case. This case is as well.

B. Respondents also argue that the court of appeals did not establish a de facto requirement that officers must warn bus passengers of their right to refuse consent. Resp. Br. 14-20. That contention is contrary to their position before the district court, where they contended that "[t]he Eleventh Circuit has made it fairly clear that they're going to insist that police officers tell the passengers they have a right to refuse the search or they're going to find the searches illegal." J.A. 119. See J.A. 120, 127; U.S. Br. 30.

Respondents rely primarily on the Eleventh Circuit's rejection of an *express* per se warning requirement, Resp. Br. 16-18, and their claim that the Eleventh Circuit has

considered individual circumstances when applying the *Bostick* standard, *id.* at 20-21. As this Court has noted, however, there is nothing remarkable about an "ostensibly * * * highly fact-dependent totality-of-the-circumstances test[] approach[ing] a per se rule in application." *Allentown Mack Sales & Serv., Inc.* v. *NLRB*, 522 U.S. 359, 373 (1998). And it is precisely such a "per se rule in application" that the Eleventh Circuit has established. Although Eleventh Circuit cases invalidating bus passenger consent searches are legion, see Pet. 22 n.2; Pet. Reply 8-9 & n.3; U.S. Br. 29-30, respondents cite not a single Eleventh Circuit decision upholding a bus passenger's consent as valid absent an explicit warning of the passenger's right to refuse cooperation.

Indeed, while respondents purport to identify ways officers can obtain valid consent absent a warning, Resp. Br. 20, their suggestions only underscore the per se nature of the Eleventh Circuit's rule. Respondents contend that officers can "approach passengers in the terminal" instead of on the bus, or should "stand with [a] drug dog as passengers reboard the bus." *Ibid.* By suggesting that officers should obtain consent by approaching passengers *outside* the bus, respondents tacitly acknowledge that officers cannot obtain valid consent from passengers on the bus. Respondents provide only one example of a circumstance under which an officer might validly obtain consent from a passenger on a bus. A passenger's consent might be valid, they suggest, if the officers ask the passenger to "volunteer" for a search. *Ibid.* In so doing, however, respondents are merely requiring that officers effectively inform the passenger of the right to refuse consent. Thus, far from proving that there is no per se warning requirement, respondents confirm it.

This Court has consistently refused to impose a judicial script on officer-citizen interactions in the Fourth Amendment context, finding it inconsistent with the "informal, unstructured context of a consent search." *Bustamonte*, 412 U.S. at 245; *Ohio* v. *Robinette*, 519 U.S. 33, 39-40 (1996) (labeling proposed warning requirement "thoroughly impractical" and "unrealistic"). Respondents argue that the police already script their interactions with bus passengers. Resp. Br. 26. The claim that Officer Lang "scripts" his interviews, however, is not supported by the record. And even if some police officers follow standardized practices, nothing in the Constitution requires every police officer in every State to employ a judicially approved script when seeking consent.

Respondents' claim that the imposition of a warning requirement would benefit officers and citizens, Resp. Br. 26 n.21, is also incorrect. Indeed, passengers might be confused or intimidated by incomplete or inarticulate warnings. U.S. Br. 33 n.6. The courts, moreover, would repeatedly be called upon to pass on the adequacy of warnings. For example, in *United States* v. *Stephens*, 206 F.3d 914 (9th Cir. 2000), the majority parsed the officer's warning and faulted it because the officer told passengers that they were "not under arrest" and were "free to leave," but added, "[h]owever, we would like to talk to you." *Id.* at 916. The warning, the majority stated, backfired by conveying the impression that passengers could avoid cooperating only by getting off the bus. *Ibid.* Respondents' proposal that the officers ask a passenger if he will "volunteer" for a search can be parsed similarly. It could be understood to imply that the alternative, if the passenger does not volunteer for the search, is for the search to proceed without voluntary consent.

To ensure that their warnings are not parsed in that manner, officers likely would have to read passengers a standard—and relatively comprehensive—form warning, as they do under *Miranda*. The reading of such a warning in the otherwise-informal context of cases like this one, however, may itself create intimidation. *Miranda* warnings are typically issued to individuals who are in custody; a passenger thus might perceive warnings as a sign that the encounter has progressed beyond a simple request for cooperation. Of course, officers may find it appropriate in certain cases to provide such advice before seeking voluntary cooperation, and the provision of a warning is a relevant

factor in the seizure determination, *Bostick*, 501 U.S. at 432. But the Constitution should not be held to mandate the administration of warnings, lest officers be required to read warnings that will make innocent people, in an otherwise voluntary and casual interaction, feel like they are suspects.

II. Respondents' Seizure Test Is Incorrect

In asserting that their encounter with Officer Lang was a seizure, respondents announce and apply an incorrect legal test. In *Bostick*, this Court held that "no seizure occurs when police ask questions of an individual, ask to examine the individual's identification, and request consent to search his or her luggage—*so long as the officers do not convey a message that compliance with their requests is required.*" 501 U.S. at 437 (emphasis added). Notwithstanding that holding, respondents seek to replace the *Bostick* formulation with their own test. The proper measure of coercion in this context, respondents assert, is "whether a reasonable passenger would react any differently to the same behavior by a fellow traveler." Resp. Br. 39. The interaction in this case must have been coercive, they argue, because "a reasonable passenger would have told a total stranger" who was not an officer "to 'back off.'" *Ibid.*

Respondents cite no authority to support their proposed test, which would effectively convert all consent searches into seizures. There are few if any circumstances under which a passenger would allow a random fellow traveler to search his person or possessions. Yet this Court and the courts of appeals have routinely upheld similar searches by the police on the basis of voluntary consent. See, *e.g.*, *United States* v. *Mendenhall*, 446 U.S. 544, 557-558 (1980) (strip search); *United States* v. *Chhien*, 266 F.3d 1, 7-8 (1st Cir. 2001) (frisk); *United States* v. *Rodney*, 956 F.2d 295, 297 (D.C. Cir. 1992) (Thomas, J., joined by Ginsburg, J.); *United States* v. *Sturgis*, 238 F.3d 956, 958 (8th Cir. 2001); *United States* v. *Morgan*, 914 F.2d 272, 274-275 (D.C. Cir. 1990); *United States* v. *Gordon*, 895 F.2d 932, 937-938 (4th Cir. 1990). See also U.S. Br. 20-21.

Respondents' proposed test rests on the mistaken premise that, if passengers respond differently to an officer's request for consent than they would to a total stranger's request, that difference must result from the officer's coercive authority. But citizens respond differently to an officer's request *not* because of coercion, but rather because law-enforcement officers have a legitimate reason for seeking consent to search—the need to ensure public safety and apprehend criminals—whereas another private citizen typically does not. "[T]he community has a real interest in encouraging consent, for the resulting search may yield necessary evidence for the solution and prosecution of crime." *Bustamonte*, 412 U.S. at 243. Bus passengers thus readily consent to having their person or possessions searched, because they know it enhances everyone's interests. See J.A. 73 ("[W]e have people saying that they appreciate it because it makes them feel safe on the bus."); J.A. 100 (similar); U.S. Br. 4.[1]

For similar reasons, respondents' emphasis on the fact that the search in this case was a frisk (Br. 39) is beside the point. To the extent respondents imply that the officer

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[1] Buses are among the forms of public transportation increasingly targeted for acts of violence. See *6 Die in Greyhound Bus Crash After Attack on Driver*, Washington Post, Oct. 4, 2001, at A02; *Bus Passengers Overpower Man In Attempted Hijacking*, Washington Post, Oct. 19, 2001, at A05; *Smoker Hijacks Greyhound Bus*, The Indep. (London), Nov. 6, 2001 (reporting "the third Greyhound hijack attempt in a month"). Passenger interviews and consent searches are effective in preventing attacks. See Testimony of Isaac Yeffet, Former Director of General Security for El Al Airlines (Nov. 27, 2001) (2001 WL 26187904) ("passenger interview process is very important in achieving the first step of terrorist prevention"); Br. Wash. Legal Found. 5-7. Recognizing the threat and the resulting need for public cooperation, the traveling public is happy to assist. *Two Approaches to Security*, Business & Comm. Aviation, Nov. 1, 2001 (most people "are very understanding" and "don't mind the inconvenience to be safe and secure"); *Federalized Screeners Likely to Come*, American Political Network—The Hotline, Oct. 30, 2001 ("passengers were very aware" that searches are "for their safety and benefit and are very willing to cooperate").

frisked respondents' crotches, that is incorrect. J.A. 101 ("[Defense counsel] asked you about searching the defendant's groin areas. Were you searching the area, the male private parts? A. No, Sir."). Instead, the record shows that Lang frisked the "upper parts of [respondents'] legs," along "the crease on the front of the pants from the waistband down," J.A. 61, *i.e.*, the "front part of the thigh," J.A. 144. In any event, respondents do not explain how the nature of the frisk shows that the police, before seeking consent, "communicated the message" that the frisk was mandatory. To the extent respondents are arguing that frisks are so intrusive that "*no one* traveling on public transportation—who was free to do otherwise—would likely consent," Br. Opp. 10, they are simply arguing that all consent pat-downs are coerced. Respondents thus do not seek to vindicate the right of passengers to refuse consent. Instead, they seek to deprive passengers of the right validly to grant it.

III. Respondents' Claim That They Were Seized Is Unsupported By The Facts Or Law

Respondents argue that three main factors lead to the conclusion that they were seized: that the encounter took place on a bus; the absence of advice of their right to refuse consent; and the officers' purported show of authority. Resp. Br. 24-39. Neither alone nor in combination do those factors show circumstances "so intimidating as to demonstrate that a reasonable person would have believed" cooperation to be mandatory. *INS* v. *Delgado*, 466 U.S. 210, 216 (1984). Indeed, respondents' contrary argument rests primarily on factual claims that are not supported—and are frequently contradicted—by the record.

A. Absence of Warnings. Respondents begin by arguing that "there are psychological and practical forces * * * which render bus sweeps * * * a highly coercive environment," Resp. Br. 25, such that a warning of the passengers' rights is necessary. Respondents' primary support for the assertion that the bus environment is psychologically coercive, however, is their unsubstantiated claim that a

passenger "who does not wish to be either 'engaged' or 'searched' has no option but to try to ignore the officer or be rude to him." *Ibid.* Respondents overlook the most obvious option, which is for the passenger to tell the officer (politely) that he is not interested in talking. Nothing prevented respondents from pursuing that course of action in this case. And the officers did nothing to prevent or even discourage it.

B. Location. To support a claim of officer coercion, respondents focus extensively on the location of the encounter—*i.e.*, the fact that it took place on a bus—faulting the officers for not approaching respondents in the terminal. Resp. Br. 26-28. The record, they state, "suggests" that the officers "deliberately chose to wait to seek respondents' consent until after [respondents] were in a vulnerable position" on a bus. Resp. Br. 28. But respondents never suggested in district court that the officers targeted and followed them to the bus; the court of appeals did not accept or rely on that theory; and the record refutes it. As respondents conceded below, Brown C.A. Br. 12 n.4, Officer Lang testified that he had *not* targeted anyone. J.A. 105 ("Did you have anybody targeted or anything like that? A: No, sir.").[2]

Equally unfounded is respondents' reliance on *Florida* v. *Royer*, 460 U.S. 491 (1983). In *Royer*, the police specifically relocated the passenger to a small enclosed area, creating a situation in which the passenger might feel that his freedom of movement was restricted. See *id.* at 504-505. Here, in

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[2] Respondents now suggest that this fact may be disputed. See Resp. Br. 7 n.8. But in making that claim (and many others), respondents appear to rely on the record of Drayton's trial. Because that trial record was *not* before the district court when it ruled on respondents' motion to suppress, and neither Drayton nor Brown renewed the motion following Drayton's trial, the trial record has no bearing on the correctness of the suppression ruling. See *United States* v. *Smith*, 80 F.3d 215, 220 (7th Cir. 1996) ("When the defendant fails to renew at trial the motion to suppress," reviewing courts "should not rely on evidence first produced at trial to reverse a pre-trial denial of motion to suppress."); *United States* v. *Hicks*, 978 F.2d 722, 724 (D.C. Cir. 1993) (same); 5 W. LaFave, *Search & Seizure* § 11.1(b), at 14 (3d ed. 1996) (similar).

contrast, respondents themselves chose to board the bus. Consequently, while respondents' "movements were 'confined' in a sense," that "was the natural result of [their] decision to take the bus; it says nothing about whether or not the police conduct at issue was coercive." *Bostick*, 501 U.S. at 436.

Respondents' reliance on the allegedly "minimal" number of passengers who refuse consent, Resp. Br. 27, is similarly miplaced. The grant of consent shows citizen cooperation, not police coercion. "While most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response." *Delgado*, 466 U.S. at 216. Respondents, moreover, provide no evidence that passengers on buses consent to searches more frequently than passengers in terminals. See also U.S. Br. 26.

Finally, respondents contend that the officers "seized" all of the passengers by preventing the bus from leaving on time. Resp. Br. 29-30 & n.23. But respondents did not raise that argument before the trial court; the court of appeals never addressed it; respondents did not make that claim in opposing the petition for a writ of certiorari; and the only witness at the suppression hearing testified that the officers did *not* delay the bus. J.A. 69 ("[D]o you ever stay on the bus so long that the bus has to leave late? A. No. Sir."); J.A. 49 ("I can't detain the bus."); see also J.A. 70 (officers will not enter bus if driver is ready to leave); J.A. 79 ("When we see the driver coming up, we are usually about finished, or we're ready to get off the bus anyway.").

Respondents assert that the officers inevitably delayed the bus because (according to them) the officers entered the bus at 12:40 p.m., the bus was scheduled to leave at 12:45 p.m., and the officers ordinarily spend 15-20 minutes on a bus. Resp. Br. 29-30. Respondents provide no evidence that the officers in this case spent more than five minutes on the bus. (Lang testified that officers "try *not* to stay on there 15, 20 minutes." J.A. 70 (emphasis added).) And respondents

cite no evidence that the bus driver, who left to complete paperwork at the same time the officers boarded, Pet. App. 3a; J.A. 78, had returned before respondents' arrests.

Respondents also err in equating a delay in the bus's departure with a seizure of the passengers on board. Resp. Br. 29-30 & n.23. So long as a bus driver *voluntarily* chooses to delay the bus, there is no Fourth Amendment seizure. Having chosen to place themselves on a vehicle in the bus company's and the bus driver's control, respondents have no Fourth Amendment right to dictate the driver's decision about departure time—whether that decision is made for the driver's own reasons, or out of a voluntary desire to assist law enforcement. See *United States* v. *Hernandez*, 215 F.3d 483, 487-488 (5th Cir.), cert. denied, 531 U.S. 1038 (2000). Furthermore, even if officers invoke their authority to require a delay, the passengers are not seized when they remain free to get off the bus, to walk away (or choose some other means of transport), and to refuse cooperation if the police make a request of them. Under respondents' contrary theory, passengers would be "seized" every time a city-owned and operated bus runs late; automobile drivers would be "seized" whenever the government closes a road; and airplane passengers would be "seized" if the Federal Aviation Administration requires the cancellation of a flight or the closing of an airport.

C. Show of Authority. Given the limited significance of the absence of warnings and the location of the encounter, respondents must place primary weight on a supposedly coercive "show of authority" by the officers. Resp. Br. 28-40. In their effort to do so, however, respondents distort both the nature of the police conduct at issue here and how a reasonable person would interpret it.

1. *The officers' entry.* Respondents begin by criticizing the officers' means of entering the bus. The entry of "multiple unticketed men * * * en masse," they contend, was "at the least confusing and intimidating." Resp. Br. 29. The court of appeals' decision, however, is devoid of any sug-

gestion that the officers entered the bus in an intimidating manner, and the district court expressly rejected any such claim. The plainclothes officers, that court explained, entered just after the passengers and "could have been mistaken for other passengers." J.A. 126. That conclusion was fully supported by Officer Lang's testimony, J.A. 108 ("We boarded the bus just like we were passengers"), and respondents make no effort to show clear error.[3]

2. *The officers' positions.* Respondents' reliance on the officers' positions inside the bus is also factually and legally unsupported. According to respondents, the officers were "strategically located to effectively surround the passenger," Resp. Br. 30, because two officers (Lang and Blackburn) went to the back, while another (Hoover) kneeled in the driver's seat, facing back toward the passengers, without blocking the exit. Resp. Br. 30-31. Contrary to respondents' intimation, Officer Hoover stayed at the front to ensure the safety of the other officers, Pet. App. 3a, *i.e.*, "to check and make sure that there was no threat to the officers whose backs were turned," J.A. 130, not to surround passengers. There is no evidence that respondents saw Hoover—who may not have been easy to see from the back of the half-full bus—much less that they recognized that Hoover was an officer in civilian clothes. U.S. Br. 25-26; J.A. 45 ("Is there anything that would prevent or make it difficult for the passengers to see Investigator Hoover in that position. A. To see him—if you're not actually looking, yes, because there's a panel."). And Officers Lang and Blackburn went to the back of the bus to avoid blocking the aisle while speaking with passengers, as required by the Eleventh Circuit's decision in

[3] Respondents also rely (Br. 3, 36 n.29) on their claim that the bus driver told the officers that the bus was "all yours." Officer Lang testified that drivers usually will say *either* "'It's all yours,' something like that, *or*" will respond to a request for permission to enter by "say[ing] 'Yes,' because at that time he's going into the office." J.A. 78. Further, there is no evidence that respondents (sitting near the back of the bus) heard any comment the bus driver made to the officers outside the door at the front.

Guapi. See 144 F.3d at 1396 (criticizing officers for beginning interactions at the front of the bus, because it did not permit "those passengers who felt uncomfortable with the procedure to exit without confronting the police").

This Court has rejected the claim that the presence of an officer near an exit necessarily effects a seizure by suggesting an "intent to prevent people from leaving." *Delgado*, 466 U.S. at 218. As the Court explained, "[t]he presence of agents by the exits" while other agents interview the individuals inside "pose[s] no reasonable threat of detention"; "the mere possibility that" people might "be questioned if they sought to leave * * * should not have resulted in any reasonable apprehension by any of them that they would be seized or detained in any meaningful way." *Id.* at 219. If the presence of *armed* INS agents near the exits did not result in a seizure in *Delgado*, it is difficult to see how the presence of a plainclothes officer in the bus driver's seat with no visible weapons might contribute to the finding of a seizure here. See U.S. Br. 25-26.

Respondents attempt to distinguish *Delgado* (Br. 31) by asserting—without citation—that one of the plaintiffs there was "free to move about a large factory" and passed "unquestioned through factory doors," whereas respondents here "were not free to ignore the officers." But that supposed distinction assumes the very conclusion respondents seek to prove—that respondents "were not free to ignore the officers." In this case, the passengers were free to move around the bus, to ignore the officers, and to get off the bus. Indeed, passengers "often exited the bus while the officers were on it." Pet. App. 8a. If Hoover's presence communicated to passengers that they were confined to the bus, passengers would not "always" be "getting up and getting off the bus"—"every day"—the "whole time" the officers were on it. J.A. 81; U.S. Br. 26.

Respondents' claim that the other officers "[c]onstructively [b]locked the [a]isle," Resp. Br. 31, is likewise without merit. Both courts below found that the officers did not

block the aisle. The district court found that it was "obvious" that respondents could "get up and leave, as [could] the people ahead of them." Pet. App. 13a; J.A. 132. The court of appeals concurred. Pet. App. 3a ("The officers did not block the aisle."). It may be that passengers *behind* Lang would have had to ask him to "let [them] pass in the narrow aisle," Resp. Br. 32, but respondents were *not* behind Lang when they spoke with him. Instead, Lang "stood next to or behind" respondents, Pet. App. 3a, so that respondents could "get up and leave" at any time, Pet. App. 13a; J.A. 132.[4]

3. *Demeanor and tone.* Respondents concede that Lang's "plain clothes, quiet tone, and polite demeanor appear to weigh against finding a seizure." Resp. Br. 31. Contradicting that concession, respondents later claim that Officer Lang's voice was sufficiently loud as to be "intimidating when delivered * * * at a very close distance." Resp. Br. 35. The court of appeals, however, specifically stated that Lang's voice was "*just* loud enough for [respondents] to hear." Pet. App. 4a (emphasis added). Officer Lang testified that he used a polite tone that was not designed to carry beyond the individuals with whom he was speaking. J.A. 51-52, 58. And the district court found "nothing in [Lang's] tone of voice" to suggest bullying or abuse. Pet. App. 13a; J.A. 132. Respondents' further claim (Br. 37-38) that Lang had an "in your face" style similarly misconstrues the record. U.S. Br. 19 n.2. Respondents misleadingly omit Lang's actual testimony and the clarification that followed. Officer Lang's response to the question put to him shows that he misunderstood it, J.A. 56-57, and the Assistant United

[4] Respondents now speculate (Br. 32 n.25) that there might have been a drug-sniffing dog outside the bus. Respondents cite no evidence of any dog—"intimidating" or otherwise—from the hearing on the motion to suppress (see note 2, *supra*); respondents never relied on the alleged dog in the courts below; and they provide no evidence of the dog's location, much less evidence that it was nearby, or that any passenger was aware of it. The fact that respondents were not subjected to a dog-sniff when they were taken off the bus, moreover, suggests that there was no dog nearby.

States Attorney immediately asked a clarifying question: "I think the question the judge was asking, was there anything confrontational about your discussions?" Lang answered "No, sir. No, sir." J.A. 57. See also J.A. 58 ("I'm being friendly and courteous, and I'm using 'How are you doing?' * * * a nice tone of voice."). The court of appeals did not suggest that Lang was overbearing or confrontational, and the trial court—which heard the testimony and observed Lang's demeanor during a re-enactment of the encounter—expressly found that there was "nothing coercive" or "confrontational" about it. Pet. App. 13a; J.A. 132.

4. *The officer's conduct.* Respondents do not dispute that Lang carefully avoided intimidating movements; did not show a weapon; and in fact dressed to ensure that his firearm and handcuffs were shielded from view. See *Bostick*, 501 U.S. at 437 (emphasizing that the officers "did not point guns at Bostick or otherwise threaten him"). Respondents nonetheless claim that Lang's conduct contributed to a seizure because citizens generally *expect* officers to be armed. Resp. Br. 31. But this Court has held that police-citizen interactions are consensual so long as the "*officers* do not convey a message that compliance with their requests is required." *Bostick*, 501 U.S. at 437 (emphasis added). See also *id.* at 439 (inquiry is "whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter"). The fact that *citizens* may speculate about the presence of weapons or other potential sources of intimidation, through no fault of the officers, cannot convert an otherwise consensual encounter into a seizure. Cf. *Colorado* v. *Connelly*, 479 U.S. 157, 164-166 (1986) (confession cannot be involuntary absent police over-reaching; state action a critical component of coercion).

Respondents also fault Officer Lang for showing respondents his badge, claiming that it "reinforce[d] Lang's authority over them." Resp. Br. 33-34 & n.27. Respondents do not argue that Officer Lang displayed his badge in a manner that

was unusual; they fault him for showing it at all. It is, however, customary and appropriate for officers—particularly those wearing plainclothes—to begin interactions with citizens by identifying themselves and showing their official identification. Doing so ensures that each citizen understands that he is dealing with a law enforcement officer rather than a potentially threatening stranger. U.S. Br. 23; see also pp. 6-7, *supra*. Failure to do so would be both inappropriate and risky.

Respondents' claim that an officer can effect a seizure merely by showing a badge is without merit. Officers effect seizures not by offering proof that they are law enforcement officials, but by *invoking* their official authority or *applying force* to restrain the passengers' liberty. See U.S. Br. 22-23. The officers began the interactions at issue in *Delgado* and *Florida* v. *Rodriguez*, 469 U.S. 1 (1984), by identifying themselves and showing their badges. *Delgado*, 466 U.S. at 212-213; *Rodriguez*, 469 U.S. at 4, 6-7. Yet in each of those cases, this Court held that the encounter was consensual.

Although respondents assert that it was not necessary for Lang to show his badge because passengers would necessarily "realize Lang was a police officer" based on his conduct, Resp. Br. 33 n.27, that is not true. At a minimum, Lang had to identify himself to the *first* passenger he contacted (at the back of the bus). Lang appropriately followed the same procedure when introducing himself to each successive passenger as he moved forward. Because Lang spoke with each passenger quietly, there was no reason for him to assume that passengers heard or understood his earlier conversations with other passengers. And he surely had no way of knowing whether each and every passenger he approached had been paying attention to the earlier interactions behind them, much less such close attention as to be satisfied that Lang was a genuine police officer.

5. *Distance.* Respondents similarly err in emphasizing the limited distance (12-18 inches) between Officer Lang and respondent Brown. See Resp. Br. 34; see also *id.* at 33 n.26.

In the sometimes noisy confines of a bus, 12-18 inches is the ordinary distance from which an individual in the aisle would converse with a seated passenger. Indeed, since respondents claim that the aisle was only 15 inches wide, see Resp. Lodging at 8, Lang could not have stood further away without bending backwards in an impossible contortion or sitting in the lap of the passenger across the aisle. Nothing in the Fourth Amendment requires an officer to engage in impossible gymnastics when conversing with citizens.[5]

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[5] Respondents include in their lodging a so-called "photographic array" dramatizing an encounter between three individuals posing as police officers and two mock passengers on an (otherwise empty) bus. The "array"—which was never introduced in district court and has never been authenticated as an accurate reflection of the events of this case—grossly distorts the interaction between Officer Lang and respondents. For example, the first picture of the mock interaction (Lodging at 3, lower photo) shows the officer standing ahead of and to the side of the passenger, facing toward and looming over him. One of the officer's arms is extended around and in front of the passenger to display a badge, so that the passenger would have to swat it out of the way if he wanted to leave; and the officer's other arm rests on the back of the passenger's seat. The officer's position is entirely incorrect. Officer Lang was not ahead of respondents when he spoke to them, but next to and slightly behind them. J.A. 131-132, 142; Pet. App. 3a. Officer Lang's body was not turned toward the passengers so as to wrap around them, as in the photos. Instead, he directly faced the front of the bus. J.A. 56 ("I want the record to reflect Officer Lang is standing with his back to the rear of the bus and facing the front of the bus."). The district court thus observed that Lang was "not coming up and face to face with" respondents but instead was "talking to them from kind of their right side," a position that required respondents to turn their heads to converse with Lang, see *ibid.* (Brown's "head was turned towards me"). Further, there is no evidence that Lang extended his arm or badge around and in front of respondents as shown in the picture. There is no evidence Lang loomed over the passengers rather than bending sufficiently to be at or near their level. And there is no evidence that Lang put his arm around the passenger's seat. Respondents appear to have added those features on their own. The photographs similarly exaggerate the prominence of the officer at the front of the bus (Lodging at 2, lower photo) by using an empty bus. In this case, the bus was half full, so the heads of the other passengers would have obstructed any view of Officer Hoover at the front. The individual purporting to

6. *Identification of baggage.* Respondents also complain that Officer Lang attempted to match bags with passengers. Resp. Br. 34-35. They speculate that, if they had not identified Brown's bag as theirs, Lang might have held it up, asked who the owner was, and deemed it abandoned when no one claimed it. *Ibid.* That argument was neither pressed nor passed upon below. Further, no such event happened. Lang never held up or pointed to a bag and asked passengers to claim it. He merely asked respondents whether they had bags on the bus. Pet. App. 3a; J.A. 55-56. Nothing compelled respondents to answer that question or to point at their bag in response. They could have just as easily told Lang that they were not interested in speaking with him. Besides, there is nothing unreasonable about ensuring that every bag on a bus corresponds with an actual passenger.[6]

7. *Request for consent.* Respondents also fault the precise language Officer Lang used when seeking consent. Resp. Br. 36-37. But respondents fail to identify *anything* Lang said to imply that cooperation was mandatory. Instead, respondents criticize him for not telling respondents "that they did not have to consent to the encounter" and for not asking "[w]ill you cooperate." Resp. Br. 37. That is just another way of claiming that officers must warn citizens of their right to refuse cooperation.

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represent Hoover, moreover, appears to be sitting on his knees in an erect fashion. Officer Hoover in fact sat "*on his haunches, leaning* on the back of the driver's seat." J.A. 46 (emphasis added). And all the photographs exaggerate the closeness of the interactions by using an officer and an aisle passenger who are—unlike respondents and Officer Lang—rather portly.

[6] Passengers have no Fourth Amendment right to demand that their bags travel anonymously. See Br. Wash. Legal Found. 19-20. See also Wash. Post, Dec. 29, 2000, at A1 (packages containing bombs left on bus); Wash. Post, Nov. 24, 1996, at C03 (recommending bag-passenger matching as safety precaution). And even if some means of bag matching might give passengers reason to acknowledge ownership, respondents do not explain how those procedures would also communicate to passengers that they must consent to a search of their bags (or their persons).

Respondents' claim that Officer Lang employed the technique of "phased commitment" to obtain consent, Resp. Br. 38 n.32, is equally unfounded. Lang introduced himself and asked only three questions—whether respondents had a bag on the bus, whether he could search it, and whether he could frisk respondents for weapons. Pet. App. 4a-5a; J.A. 55-56, 59-61. There is no suggestion that Lang began with a series of innocuous requests to break down resistance to more intrusive ones. See J.A. 50-51.

Respondents also claim that Lang, after asking for consent, "did not wait for an answer." Resp. Br. 37, 42-43. In so doing, respondents do not argue that their consent was the product of a seizure; they argue instead that there was no consent at all. Both courts below, however, concluded that Lang waited for and received consent. Officer Lang "requested and received permission from Brown to conduct a pat-down." Pet. App. 5a. Indeed, when Lang asked Brown for consent, Brown said "Sure," pulled a cell phone out of his pocket, and opened his coat. J.A. 61-62. Similarly, when Lang asked Drayton for permission to perform a pat down, Drayton responded (non-verbally) by lifting his hands off his legs to permit the search. Pet. App. 5a. The district court thus found that respondents "consented to this search," *id.* at 14a; J.A. 133, and respondents show no clear error.

Finally, respondents argue that *Drayton's* consent was invalid because Officer Lang leaned across him—and thus prevented him from standing—when frisking Brown. Resp. Br. 39. Furthermore, they note that, before seeking Drayton's consent, Officer Lang arrested Brown and had him escorted off the bus. *Id.* at 40; J.A. 64-65. The court of appeals addressed neither of those claims, and neither claim suggests that Drayton was seized when he consented to the search. Even if Lang's pat-down of Brown inadvertently and momentarily prevented Drayton from leaving, the pat-down had ended and Drayton was free to leave or refuse cooperation when Lang asked him for consent. The arrest of one bus passenger, moreover, hardly implies that everyone

around him is under arrest. Thus, Drayton had no reason to think that, after the officers took Brown off the bus but left him on it, he was under arrest as well.[7]

* * * * *

For the foregoing reasons and those in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

APRIL 2002

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[7] Respondents also argue (Br. 43-44) that a defendant's consent cannot validate a search if that consent was given during an illegal seizure. That issue is not presented by this case; the question here is whether there was an illegal seizure in the first place. See U.S. Br. 33 n.5.

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No. 01-631

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IN THE

SUPREME COURT OF THE UNITED STATES

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Petitioner,

-vs.-

CHRISTOPHER DRAYTON,

Respondent.

RESPONDENT DRAYTON'S SUPPLEMENT TO MOTION TO STRIKE

RANDOLPH P. MURRELL
FEDERAL PUBLIC DEFENDER

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GWENDOLYN SPIVEY, counsel of record for Respondent Christopher Drayton, respectfully states:

1. She received a telephone call from Mr. Drayton this morning.

2. Mr. Drayton advised that he wants undersigned counsel to remain his attorney in this case. Mr. Drayton advised that he has been trying to call her for the past two (2) weeks.

3. Counsel asked Mr. Drayton why he signed the letter from Mr. Koch. Mr. Drayton said that he and his relatives had received calls from Mr. Koch and that he did not really understand why Mr. Koch wanted him to sign the letter. Mr. Drayton said Mr. Koch told him he could still have the undersigned as his attorney and he thought it was just to let Mr. Koch get copies or something. Mr. Drayton also related other advice he had been given in these conversations which appeared to be misleading.

4. Mr. Drayton is executing a letter verifying that this is his choice, which counsel will maintain in the case file or provide to the Court if desired.

Counsel respectfully renews her request that this Court deny the attempted appearance of Mr. Koch on behalf of Respondents or, alternatively, limit it to Respondent Brown.

RESPECTFULLY SUBMITTED: February 16, 2002.

By: Gwendolyn Spivey
GWENDOLYN SPIVEY
Assistant Federal Public Defender

No. 01-631

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,

Petitioner,

v.

CHRISTOPHER DRAYTON,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CERTIFICATE OF SERVICE

I CERTIFY, pursuant to Supreme Court Rule 29.5, that on this 16th day of February, 2002, a true copy of Respondent Drayton's Supplement to Motion to Strike was mailed to Assistant United States Attorney Michael Simpson, 111 N. Adams Street, 4th Floor, Tallahassee, FL 32301; mailed and faxed to the Office of the Solicitor General, Room 5712, Department of Justice, 950 Pennsylvania Avenue, NW, Washington, D.C. 20530-0001 (202/633-2201); faxed to Respondent Brown's attorney, Steven Seliger, Esquire, Post Office Box 324, Quincy, Florida 32353-0324; faxed to James B. Koch, Esquire, Gardiner, Koch and

Weisberg, 53 West Jackson Blvd., Suite 1550, Chicago, IL 60604; and mailed to Respondents, Mr. Christopher Drayton, 16000 Bunche Park School Drive, Opa Locka, Florida 30054, and Mr. Clifton Brown, Jr., 19220 N.W. 37th Avenue, Miami, Florida 33056.

Respectfully submitted,

RANDOLPH P. MURRELL
FEDERAL PUBLIC DEFENDER

By: Gwendolyn Spivey

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Supreme Court, U.S.
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(5)

No. 01-631

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

CHRISTOPHER DRAYTON AND CLIFTON BROWN, JR.,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AND THE ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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February 19, 2002

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–INTERESTS OF THE *AMICI CURIAE*

The Washington Legal Foundation (WLF)[1] is a non-profit public interest law and policy center with supporters in all fifty states. WLF devotes a substantial portion of its resources to supporting the Nation's campaign against drug trafficking as well as its efforts to improve domestic security. To that end, WLF has appeared as *amicus curiae* before this Court as well as other federal and state courts in cases involving Fourth Amendment issues.

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

SUMMARY OF ARGUMENT

This case involves one of the most important and commonly used tools of law enforcement – consensual police questioning of citizens. This Court, as well as many others, has recognized this type of police-citizen encounter to be vital to the safety and security of all citizens. The significance of consensual police-citizen questioning is amplified in the context presented here – public surface transportation such as buses and trains. It has long been the case that such transportation systems have been targeted by criminals. And in the new domestic security environment, we can

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[1] Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amici* and their counsel, made a monetary contribution to the preparation or submission of this brief. The parties' written consents to the filing of this brief have been filed with the Clerk of the Court.

legitimately expect the criminal focus on public surface transportation to increase.

The question before the Court – the circumstances under which police-citizen questioning in the context of public surface transportation (specifically, aboard a bus) becomes a seizure under the Fourth Amendment – therefore has significant implications. In *Florida v. Bostick*, 501 U.S. 429 (1991), the Court held that the relevant inquiry is whether, under the totality of the circumstances, "a reasonable person would feel free to decline the officer's requests or otherwise terminate the encounter." *Id.* at 436. This holding has been criticized for creating a supposedly unrealistic test, and the lower courts have encountered considerable difficulty in uniformly applying the holding of *Bostick*, even in similar factual scenarios. This is especially true of the question of the weight the courts are to accord the common fact that the officers in a given situation have not informed the citizen whom they are questioning of the right not to cooperate with the questioning. In this case, the lower court effected a *per se* rule that officers conducting questioning of citizens on a bus must give such a warning. In doing so, the court of appeals misconstrued *Bostick*.

When one traces the development of the Court's jurisprudence, it becomes apparent that the core question in determining whether police questioning becomes a seizure, is the voluntariness of the interaction. As defined by this Court in *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), the concept of voluntariness is an accommodation of the importance of the police activity with the possibility of unfair or brutal police tactics. The relevant standard, therefore, is whether the police conduct is so intimidating as to overwhelm the will of a reasonable person and critically impair that person's self-determination. *Id.* at 225.

Focusing on this foundation, it becomes apparent that the Fourth Amendment does not demand a *per se* requirement that officers inform citizens of their right to refuse to answer

questions, even in the confines of a bus. Given this, *amici* urge the Court to reverse the lower court and to reaffirm the vitality of *Bostick*.

ARGUMENT

I. CONSENSUAL QUESTIONING OF CITIZENS BY POLICE IS AN IMPORTANT TOOL FOR LAW ENFORCEMENT

Police questioning of citizens that is not based on any reasonable suspicion of criminal activity is an essential law enforcement tool. This type of consensual police-citizen encounter often leads to important information or evidence of a crime:

> [T]he police interest in *voluntary* questioning is great. To hold that the police cannot even ask voluntary questions of those who strike them as knowledgeable or suspicious would severely interfere with their ability to detect or investigate burglaries, murders, drug traffic and other crimes . . . . to force the police to give up the practice of polite, voluntary questioning would threaten serious harm to the public interest in safety and effective law enforcement . . .

United States v. Berryman, 717 F.2d 651, 661 (1st Cir. 1983) (Breyer, J., dissenting). Moreover, consensual questioning is the most common type of police-citizen encounter. For example, in one case involving the Metropolitan Police Department of the District of Columbia, the evidence showed that 49.5% of all of the police-citizen encounters recorded by the Department were defined as "face-to-face communication with an individual under circumstances in which the individual is free to leave if he wishes." *Gomez v. Turner*, 672 F.2d 134, 137-38 (D.C. Cir. 1982).

It is important, therefore, to carefully distinguish between consensual police-citizen encounters and those encounters

that amount to a seizure of the person under the Fourth Amendment. If the courts define the scope of consensual police-citizen questioning more narrowly than warranted by the dictates of the Fourth Amendment, law enforcement efforts will be hampered without justification. As Justice Stewart recognized:

> [C]haracterizing every street encounter between a citizen and the police as a "seizure," while not enhancing any interest secured by the Fourth Amendment, would impose wholly unrealistic restrictions upon a wide variety of legitimate law enforcement practices. The Court has on other occasions referred to the acknowledged need for police questioning as a tool in the effective enforcement of the criminal laws. "Without such investigation, those who were innocent might be falsely accused, those who were guilty might wholly escape prosecution, and many crimes would go unsolved. In short, the security of all would be diminished."

United States v. Mendenhall, 446 U.S. 544, 556 (1980) (opinion of Stewart, J.) (quoting *Schneckloth*, 412 U.S. at 225).

A. Consensual Questioning Is An Especially Important Law Enforcement Tool in the Context of Public Transportation

The need for this careful delineation is especially important for police-citizen encounters on public transportation. The Nation's public transportation system is particularly vulnerable to crime. And this vulnerability is intensified in the context of surface transportation systems such as buses and trains. These modes of transportation are immense and are used by millions of citizens.[2] Moreover, statistics show

[2] The U.S. Department of Transportation reports that U.S. public transportation agencies carry approximately 8 billion passengers per year. *See* U.S. Department of Transportation, Federal Transit Administration, *Surface Transportation Security: Vulnerabilities and Developing Solutions*, *available at* <http://www.fta.dot.gov/research/safe/pubs/sursec/sursec.html> ("*FTA Report*"). One of the largest bus lines reported 25.4 million passenger boardings in 2000. *See* Greyhound Facts & Figures, *available at* <http://www.greyhound.com/company/intermodal/factsandfigures.shtml>. Amtrak reported its train ridership in 2000 to be 84.1 million. National Association of Railroad Passengers, *Basic Amtrak Statistics*, *available at* <http://www.narprail.org/amstat.htm>

that the majority of public transportation violent crimes and drug violations occur on the types of public surface transportation that will be impacted by the Court's decision in this case – motor buses and heavy rail trains.[3] The evidence also shows that smugglers target commercial carriers, apparently because "the odds of successful interdiction are minuscule." Steven E. Flynn, *Transportation Security: Agenda for the 21st Century*, TR NEWS 3, 4 (No. 211, Nov.-Dec. 2000) (noting conservative estimates of 129 to 172 metric tons of cocaine arrived in the United States via commercial carrier in 1997). Largely because of these problems, the U.S. Department of Transportation is currently proposing a budget of $1.9 billion for national security programs in 2002. U.S. Department of Transportation, 2002 BUDGET IN BRIEF at 9.

Given these realities, the need for consensual police-citizen questioning in public transportation situations cannot be

[3] Bureau of Transportation Statistics, U.S. Department of Transportation, *National Transportation Statistics, Reports of Violent Crime, Property Crime, and Arrests by Transit Mode* at Table 2-34 (2001). Official statistics are only kept for urbanized areas with populations over 200,000. *Id.* The records show that in the years 1995-98, the following crime occurred in this limited subset of public transportation: 109 homicides, 145 forcible rapes, 15,818 robberies, 11,204 aggravated assaults, 11,563 other assaults, 3,476 sex offenses, and 14,699 drug violations.

questioned.[4] While many have questioned the desirability of consensual police-citizen questioning on public surface transportation as a tool for the Nation's war on drugs (reflecting more of a cynicism toward the war on drugs in general than the efficacy of such questioning), the value of this law enforcement tool in the current domestic security environment is indisputable. Experts have years ago recognized that "[c]ontemporary terrorists have made public transportation a new theater of operations." Brian Michael Jenkins, *Protecting Surface Transportation Systems and Patrons from Terrorist Activities: Case Studies of Best Security Practices and a Chronology of Attacks*, Norman Y. Mineta International Institute for Surface Transportation Policy Studies, Report 97-4 at 1 (1997). The threat of terrorism is especially prevalent for surface transportation:

> Open to relatively easy penetration, trains, buses, and light rail systems offer an array of vulnerable targets to terrorists who seek publicity, political disruption, or high body counts. High concentrations of people in relatively crowded quarters are inviting fodder for those who would cause mayhem and death.

Brian Michael Jenkins & Larry N. Gerston, *Protecting Public Surface Transportation Against Terrorism and Serious Crime: Continuing Research on Best Security Practices*,

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[4] *See, e.g., United States v. Flowers*, 912 F.2d 707, 710 (4th Cir. 1990) ("[Interdiction] programs seek to assure the safety of passengers and to prevent public transport from becoming a haven for narcotics trafficking. They depend for their success upon voluntary interviews with passengers, searches of abandoned or unclaimed luggage, and/or searches pursuant to voluntary consent."); *United States v. Seventy-Three Thousand, Two Hundred Seventy-Seven Dollars, United States Currency*, 710 F.2d 283, 289 (7th Cir. 1983) ("voluntary police-citizen encounters are necessary, particularly at major metropolitan airports, in order that law enforcement officers might attempt to protect the security of our nation").

Mineta Transportation Institute Report 01-07 at 1-2 (2001) ("MTI REPORT 01-07").[5] "That surface transportation terrorism has become an international phenomenon is beyond dispute. The nearly 800 accounts described in two volumes of examination testify to the extent that the practice of this abhorrent activity extends almost everywhere." MTI REPORT 01-07 at 101.

Experts in transportation security have verified that police presence aboard public transportation, which will inevitably lead to police-citizen encounters, results in reduced violent crime. *See* Jerome A. Needle & Renee M. Cobb, *Improving Transit Security*, Synthesis 21, Transit Cooperative Research Program, Transportation Research Board, National Research Council at 8-9 (1997); *FTA Report*, *supra*, at § 3.3 (noting uniformed and non-uniformed officer strategies to reduce crime on surface transportation). More to the point, the experience of transportation security agencies is that consensual police-citizen questioning is a valuable deterrent to would-be assailants. *See, e.g.*, MTI REPORT 01-07 at 45 (recounting experience of the Bay Area Rapid Transit District, which is the largest automated rail service in California). As the threat of terrorism against surface transportation grows, the importance of consensual police-citizen questioning in public transportation contexts increases.

II. THE COURT WILL UNDOUBTEDLY BE ASKED TO REDEFINE THE SCOPE OF CONSENSUAL POLICE QUESTIONING

Despite the importance of consensual police-citizen questioning, the Court's jurisprudence concerning when a

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[5] *See also FTA Report, supra,* at § 1 ("A surface transportation system is vital to any Nation's economy, defense and quality of life. Because transportation systems bring masses of people together and are highly visible and familiar, they are particularly attractive targets for both terrorism and crime").

police-citizen encounter becomes a seizure under the Fourth Amendment has been the source of unending scholarly criticism and the source of disparate judicial interpretations. Given this, the Court will surely be asked to use this case as an opportunity to revisit *Bostick* and the scope of consensual police-citizen questioning, specifically with regard to the issue of whether police should be required to inform citizens of the right to decline to answer questions. The Court should rebuff this effort, however, because the Court's jurisprudence is solidly grounded on the concept of "voluntariness," which by definition takes into account the importance of the police activity and precludes any such *per se* requirement.

A. The Court's Development of the "Free to Leave" and "Free to Decline" Tests

It is beyond dispute that "[t]here is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets." *Terry v. Ohio*, 392 U.S. 1, 34 (1968) (White, J., concurring). Rather, it is "[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *Id.* at 19 n.16 (majority opinion). In *United States v. Mendenhall*, 446 U.S. 544 (1980), Justice Stewart first formulated what would become this Court's test to discern when a police-citizen encounter becomes a seizure under the Fourth Amendment: "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Id.* at 554.

The Court has since embraced this "free to leave" test, which is an objective standard based on the "totality of the circumstances." *See Michigan v. Chesternut*, 486 U.S. 567, 573 (1988); *INS v. Delgado*, 466 U.S. 210, 215 (1984); *Florida v. Royer*, 460 U.S. 491, 502 (1983) (plurality). By looking to whether the reasonable person would have

believed that he was "free to leave," the test "is designed to assess the coercive effect of police conduct." *Chesternut*, 486 U.S. at 573.

In *Bostick*, a case also involving a police-citizen questioning aboard a bus, the Court recognized that in some situations, a citizen will not "feel free to leave" because the citizen's "freedom of movement was restricted by a factor independent of police conduct." 501 U.S. at 436. Thus, "the degree to which a reasonable person would feel that he or she could leave is not an accurate measure of the coercive effect of the encounter." *Id.* In such a situation, the Court held that "the appropriate inquiry is whether a reasonable person would feel free to decline the officer's requests or otherwise terminate the encounter." *Id.* at 435-36. The Court also made it clear that "the 'reasonable person' test presupposes an innocent person." *Id.* at 438.

B. Critics Assert That the Tests Suffer From Conceptual Difficulties That Make Them Untenable

Critics of this Court's jurisprudence on consensual police-citizen encounters claim that the "free to leave" test is fatally flawed. According to many courts and commentators, "in virtually every police-citizen encounter the average citizen does not feel free to walk away. Thus, if the ["free to leave"] test was applied consistent with reality, all police-citizen encounters would be seizures." Edwin J. Butterfoss, *Criminal Law: Bright Line Seizures: The Need for Clarity in Determining When Fourth Amendment Activity Begins*, 79 J. CRIM. L. & CRIMINOLOGY 437, 463 (1988); *see also United States v. Cordell*, 723 F.2d 1283, 1286 (7th Cir. 1983) (Swygert, J., concurring).[6]

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[6] *See also* Daniel J. Steinbock, *The Wrong Line Between Freedom and Restraint: The Unreality, Obscurity, and Incivility of the Fourth Amendment Consensual Encounter Doctrine*, 38 SAN DIEGO L. REV. 507, 522 (2001) (arguing that the Court's "picture

Critics have also charged that in reformulating the "free to leave" test in *Bostick*, the Court exacerbated this conceptual difficulty. As noted by the dissent in *United States v. Little*, 18 F.3d 1499 (10th Cir. 1994), "commentators almost unanimously have condemned the *Bostick* opinion." *Id.* at 1509 & n.4 (*en banc*) (Logan, J., dissenting) (citing leading treatise and law review articles).[7] The common element of these criticisms is that an average person will not "feel free" to decline to answer questions during any police-citizen encounter in the confines of a bus. Based on this supposition, these critics often suggest that any police-citizen encounter on a bus or similar form of transportation should be considered a seizure *per se*.[8]

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of a reasonable person is simply out of touch with societal reality" since "most people have neither the knowledge nor the fortitude to terminate unwanted interactions with the police"); *see also* Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258, 1301 n.205 (1990).

[7] *See also* Shawn V. Lewis, Comment, *The Intrusiveness of Dragnet Styled Drug Sweeps*, 82 J. CRIM. L. & CRIMINOLOGY 797, 818 (1992) (criticizing *Bostick* for assuming "artificial reasonable person who would assert himself in most police encounters, even though the average citizen would not"); Todd M. Haemmerle, Comment, Florida v. Bostick: *The War on Drugs and Evolving Fourth Amendment Standards*, 24 U. TOL. L. REV. 253, 265 (1992) ("reasonable person" more "courageous" than average); *The Supreme Court, 1990 Term: Leading Cases*, 105 HARV. L. REV. 177, 305 (1991) (arguing that an individual in a restricted environment is less likely to exercise his right not to be interrogated).

[8] *See, e.g.*, 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 9.3(c) (3d ed. 1996) (arguing for *per se* seizure because "the police dominance of the situation" and "bus travelers . . . do not, as a practical matter, have available the range of avoidance options which pedestrians and airport travelers might utilize").

C. The Asserted Conceptual Difficulties Have Infected The Courts

The lower courts have not been immune from the force of the critics' claimed conceptual difficulties. While the lower courts are of course obliged to follow *Bostick*, the impact of the supposed problems with the *Bostick* test manifests itself in disputes over what factors the courts may consider and what weight to give these factors.[9]

While the criticisms and differences are understandable if one focuses myopically on the words of the "free to leave" and *Bostick* tests, this concentration misapprehends the basis for these tests. As demonstrated below, the line that separates permissible police-citizen questioning from a seizure is voluntariness. And using the concept of "voluntariness" as a base resolves the supposed difficulties with the *Bostick* test.

III. THE COURT SHOULD REAFFIRM *BOSTICK* AS SOLIDLY SUPPORTED BY THIS COURT'S FOURTH AMENDMENT JURISPRUDENCE

Given the increasing importance of consensual police-citizen questioning in public transportation situations as well as the apparent confusion in the lower courts, the Court should clarify the relevant standard by returning to the

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[9] *Compare United States v. Washington*, 151 F.3d 1354, 1357 (11th Cir. 1998) (duty to obey police a factor) *with Gomez v. Turner*, 672 F.2d 134, 142 (D.C. Cir. 1982) (feelings of civic duty not a factor); *compare United States v. Ward*, 961 F.2d 1526 (10th Cir. 1992) (nonpublic location substantial factor) *with United States v. Little*, 18 F.3d 1499, 1504 n.5 (10th Cir. 1994) (*en banc*) (nonpublic location irrelevant); *compare Little*, 18 F.3d at 1506 (incriminating questions not a factor) with *United States v. White*, 890 F.2d 1413, 1416 (8th Cir. 1989) (seizure occurred when officer told defendant that he was stopped because he fit drug courier profile).

touchstone of the consensual police-citizen encounter – voluntariness.

A. The Touchstone For the Line Between Permissible Questioning and A Fourth Amendment Seizure Has Always Been Voluntariness

By tracing the development of this Court's jurisprudence on police-citizen encounters, it becomes apparent that the normative underpinning of what separates a situation where the Fourth Amendment is not implicated from those constituting a seizure has been voluntariness. While the genesis of the Court's "free to leave" test has been attributed to Justice Stewart's opinion in *Mendenhall*, which drew on dicta and the concurring opinion in *Terry*, the roots run deeper. *Mendenhall* itself relied on *Sibron v. New York*, 392 U.S. 40 (1968), which, while not deciding whether a seizure had taken place at the particular point in the officer-citizen encounter, framed the issue as "whether [the defendant] accompanied Patrolman Martin outside in a submission to a show of force or authority which left him no choice, or whether he went *voluntarily* in a spirit of apparent *cooperation*." *Id.* at 63 (emphasis added).

Justice Stewart's opinion in *Mendenhall* stated the applicable test as: "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." 446 U.S. at 554. While this "free to leave" test was developed from the *Terry* dicta that "[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred," *Terry*, 392 U.S. at 19 n.16, the core of the test is voluntariness. As later recognized, the opinion of Justice Stewart was based on "the view that the entire encounter was *consensual* and that no seizure had taken

place." *Royer*, 460 U.S. at 491 (plurality opinion) (emphasis added).

As the plurality in *Royer* explained, a seizure does not occur so long as the citizen's cooperation is voluntary:

> [L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions.

460 U.S. at 497. In that case, the law enforcement officers' conduct resulted in a seizure of the defendant because the defendant's cooperation became involuntary: "What had begun as a *consensual* inquiry in a public place had escalated into an investigatory procedure in a police interrogation room . . . . any *consensual* aspects of the encounter had evaporated." *Id.* at 503 (emphasis added). In adopting the "free to leave" test from Justice Stewart's opinion in *Mendenhall*, the plurality recognized the task as "distinguishing a *consensual* encounter from a seizure." *Id.* at 506.

Thus, while framed in terms of whether a reasonable person would have believed that he was free to leave, what distinguishes a police-citizen encounter as a seizure or not a seizure is the voluntariness of the interaction.[10] This is demonstrated by the Court's explanation that the "free to

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[10] *See also Delgado*, 466 U.S. at 229 (Brennan, J., dissenting) ("Although none of the respondents was physically restrained by the INS agents during the questioning, it is nonetheless plain beyond cavil that the manner in which the INS conducted these surveys demonstrated a 'show of authority' of sufficient size and force to *overbear the will of any reasonable person*." (emphasis added)).

leave" test "is designed to assess the coercive effect of police conduct." *Chesternut*, 486 U.S. at 573. The logic is that if a reasonable person would not feel free to leave, the interaction is not consensual because the officer's conduct has coerced compliance.

B. By Definition, The Concept of Voluntariness Accommodates the Importance of Police-Citizen Questioning

For many police-citizen interactions, the "free to leave" test works as a measure of the voluntariness of the encounter because a restriction on a person's physical freedom of movement by "physical force or a show of authority" is the essence of a seizure. *T ~ry*, 392 U.S. at 19 n.16; *see also California v. Hodari D*, 499 U.S. 621, 625 (1991). Where a person's freedom of movement is already restricted for reasons other than the police presence, as in *Bostick*, the analogy to a physical seizure breaks down. Thus, the *Bostick* inquiry of "whether a reasonable person would feel free to decline the officer's requests" is further attenuated from the core question of voluntariness.

But by framing the issue as whether a reasonable person would "feel" free to decline to answer the officer's questions, the language that the Court used subtly changed the emphasis of the voluntariness test. Since the "feel free" test brings with it an emotional aspect, the critics rightly ask, "Who would *feel* free to ignore an officer's show of authority?" It can be questioned, therefore, whether the "feel free to decline" test is the appropriate measure of the coerciveness of the interaction. The concept of voluntariness, however, does not turn on epistemology.

> Rather, "voluntariness" has reflected an accommodation of the complex values implicated in police questioning of a suspect. At one end of the spectrum is the acknowledged need for police questioning as a tool for the effective enforcement of criminal laws. . . . At the other end of the spectrum is the set of values reflecting society's deeply felt belief that criminal law cannot be used as an instrument of unfairness, and that the possibility of unfair and even brutal police tactics poses a real and serious threat to civilized notions of justice.

Schneckloth, 412 U.S. at 224-25; *see also id.* at 227 ("two competing concerns must be accommodated in determining the meaning of 'voluntary' consent – the legitimate need for such searches and the equally important requirement of assuring the absence of coercion").

Although developed in the parallel branch of Fourth Amendment jurisprudence dealing with consensual searches, the *Schneckloth* definition of voluntariness is no doubt applicable to consensual police-citizen questioning. As the Court explained in *Hodari D*, a seizure requires submission. 499 U.S. at 628-29. "Since voluntary consent and submission are essentially opposing sides of the same coin, the standard for measuring consent should be equally satisfactory to determine whether, instead of consenting, the person surrenders to the authority by recognizing that he or she is subject to the will of the police." Thomas K. Clancy, *The Future of Fourth Amendment Seizure Analysis after* Hodari D *and* Bostick, 28 AMER. CRIM. L. REV. 799, 821-22 (1991).

This is not to say that the Court should require an inquiry into the citizen's subjective state of mind; the Fourth Amendment standard for what constitutes a seizure is necessarily objective. *See Chesternut*, 486 U.S. at 574; *see also Florida v. Jimeno*, 500 U.S. 248, 251 (1991) (holding that the scope of a consent search must be determined by an objective standard). "Voluntariness" for purposes of seizure analysis, therefore, must be seen through the objectifying lens of a reasonable person and the need for police to determine when questioning becomes a seizure. *See id.*

Given the importance of police-citizen questioning (especially in the context of public transportation), the

Schneckloth concept of "voluntariness" clarifies the line between consensual police-citizen questioning and a seizure. Only if the citizen's cooperation with the police is *involuntary* does the interaction become a seizure. The relevant question, therefore, is perhaps not best framed as "whether a reasonable person would *feel* free to decline the officer's requests," but whether (under the totality of the circumstances) the police conduct was so intimidating that a reasonable person's "will has been overborne and his capacity for self-determination critically impaired." 412 U.S. at 225.

The critics' assertion that no reasonable person would feel free to decline to answer an officer's questions therefore misses the mark. By definition, the concept of voluntariness accommodates the recognized importance of police questioning of citizens aboard surface transportation that is not supported by reasonable suspicion. This, of course, necessarily precludes any *per se* rule that such questioning constitutes a seizure.

That *Bostick* ultimately rests on the concept of voluntariness demonstrates that the decision was sound. Nonetheless, the Court's formulation of the relevant test (focusing on whether the reasonable person would have *felt* free to decline to answer the officer's questions) may have resulted in the lower courts unnecessarily restricting the scope of consensual police-citizen questioning.

C. By Focusing on Whether the Police Conduct Would Overbear a Reasonable Person's Will and Critically Impair That Person's Capacity For Self-Determination, the Court Would Clear Up the Confusion in the Lower Courts

By explicating the roots of the *Bostick* test, the Court would do much to stem the disparate results in the lower courts, which are based on differing treatment of certain factors. For example:

Civic duty to obey the police: In *United States v. Washington*, 151 F.3d 1354 (11th Cir. 1998), the Eleventh Circuit stated that, given the factual situation, "[a]bsent some positive indication that they were free not to cooperate, it is doubtful a passenger would think he or she had the choice to ignore the police presence. Most citizens, we hope, believe that it is their duty to cooperate with the police." *Id.* at 1357. Other courts, however, have explicitly recognized that "feelings of civic duty, moral obligation, or simply proper etiquette, will often lead a reasonable person to cooperate." *Gomez*, 672 F.2d at 141-42. Accordingly, "[t]here must be some additional conduct by the officer to overcome the presumption that a reasonable person is willing to cooperate with a law enforcement officer." *Id.* at 142.

If the relevant question focuses not on whether a reasonable person would "feel" free to decline to answer, but rather whether that person's will was overborne, it becomes clear that feelings of duty and respect for police should not be considered in the totality of the circumstances. Feelings of civic duty do not add to the measure of the coerciveness of the questioning.

The location of the encounter: In *United States v. Ward*, 961 F.2d 1526 (10th Cir. 1992), the court found the fact that the defendant was questioned in a "nonpublic" small roomette aboard a passenger train weighed substantially in favor of finding an unlawful seizure. *Id.* at 1529-31. Addressing a case where the police-citizen questioning also occurred in a train roomette, the Tenth Circuit *en banc* observed in contrast:

> [I]t is simply an assumption, unsupported by any specific data or evidence, that a person in a private train roomette, not in the view of other passengers, will feel more vulnerable to coercion than a person who is in the view of other people. It may be that many people would in fact feel more "coerced" in a public setting, where they might be embarrassed to decline police requests in the hearing and view of others.

United States v. Little, 18 F.3d 1499, 1504 n.5 (10th Cir. 1994) (*en banc*) (*Little I*). In the very same case, in an appeal after remand, however, a panel of the Tenth Circuit viewed the "confined space" and the fact that the questioning was "outside public view" as a factor in holding that the defendant was seized. *United States v. Little*, 60 F.3d 708, 713 (10th Cir. 1995) (*Little II*). And another panel of the Tenth Circuit also considered questioning in a "nonpublic place" to be a factor. *United States v. Sanchez*, 89 F.3d 715, 718 (10th Cir. 1996); *see also Ward*, 961 F.2d at 1532 n.5 (rejecting holdings of several District of Columbia Circuit opinions on this issue).

Again, if the relevant question is whether the police conduct was so intimidating as to critically impair a reasonable person's capacity for self-determination, the public or nonpublic location of the encounter should be irrelevant. Whether a person would feel embarrassed to refuse to answer questions posed by an officer in front of others or would feel somehow "safer" in public does not add to the analysis.

Incriminating questions: In *Ward*, the Tenth Circuit reasoned that an officer asking "not just general inquiries, but . . . focused, potentially incriminating questions" is a factor tending to show a seizure because a person would not feel free to ignore the police questioning. 961 F.2d at 1532. In *Little I*, however, the Tenth Circuit stated that "the asking of 'incriminating questions' is irrelevant to the totality of the circumstances surrounding the encounter." 18 F.3d at 1506. Many other courts, however, place great weight on focused and incriminating questions. *See, e.g., United States v. White*, 890 F.2d 1413, 1416 (8th Cir. 1989) (seizure occurred when officer told defendant that he was stopped because he fit drug courier profile); *United States v. Berry*, 670 F.2d 583, 597 (5th Cir. 1982) (*en banc*) (reasoning that questions intimating that investigation was focused on an individual would lead a reasonable person to believe that he was not free to go).

Whether the officer's questions were focused on defendant may well bear on whether a reasonable person would have *felt* free to decline to answer, but the nature of the questions would have little impact on whether the conduct overbore a reasonable person's will. Turning to the core issue of voluntariness, therefore, helps to resolve the conflict

Personal traits of the defendant: In *Ward*, the Tenth Circuit observed that the fact that the defendant was of "slight physique" and had "recently undergone a kidney transplant for which he was still taking medication" suggested that he "was more easily intimidated." 961 F.2d at 1533. In *Little I*, however, the Tenth Circuit rejected the relevance of the defendant's subjective state of mind and held that only personal traits or characteristics known to the questioning officer are relevant. 18 F.3d at 1505.

Although a factor in consent search cases, the concept of voluntariness in consensual police-citizen questioning must be based on objective standards. As the court held in *Little I*, the personal traits of the defendant are only relevant if they were known to the questioning officer.

The failure to inform of the right not to respond: In the case before the Court, the Eleventh Circuit's opinion leaves little doubt that it placed heavy emphasis on the fact that the officers did not inform the bus passengers of the right not to cooperated with the officer's questioning, as it had in *Washington*, 151 F.3d at 1355. The Ninth Circuit has also given this factor dispositive weight. *See United States v. Stephens*, 206 F.3d 914, 917 (9th Cir. 2000). The Tenth Circuit, on the other hand, has at one time held that this is a substantial factor in holding that a police-citizen encounter is a seizure, *see Ward*, 961 F.2d at 1529, and at another criticized the Eleventh Circuit for placing too much weight on it, *see United States v. Broomfield*, 201 F.3d 1270, 1275 (10th Cir. 2000).

While a factor, the failure of the police to inform of the right not to respond cannot be dispositive; "knowledge of a right to refuse is not a prerequisite of a voluntary consent." *Schneckloth*, 412 U.S. at 234.

Similarly, by focusing on voluntariness, the Ninth Circuit would not have concluded in *Stephens* that the officer's announcement in that case resulted in a seizure. In that case, three officers boarded a bus stopped for servicing and announced over the public address system that they were "conducting a routine narcotics and weapons investigation on this bus. No one is under arrest, and you are free to leave. However, we would like to talk to you." 206 F.3d at 916. The Ninth Circuit reasoned that this conveyed the message that they could "stay on the bus and consent to the search, or get off the bus" and (supposedly) run the risk of raising a reasonable suspicion. *Id.* at 917. This supposed message, combined with the cramped quarters of the bus, the presence of three plain clothes officers, and the fact that the defendant was questioned first, resulted in a seizure of the defendant when an officer asked him if he owned a certain bag. *Id.* at 917-18.

As the dissent noted, however, the defendant had three choices: truthfully respond to the officer's questions, deny he had any baggage, or ignore the question and say nothing. *Id.* at 919 (Sneed, J., dissenting). Had the question been whether the defendant's denial of ownership was the result of intimidation so great as to critically impair a reasonable person's capacity for self-determination, the majority may well have agreed with the dissent. But focusing on whether a reasonable person would *feel* able to decline to answer led to a split in the panel.

If uncorrected, it is not hard to see how the current lower court case law will lead to flawed results. Imagine a uniformed officer riding aboard a fairly crowded passenger train who notices a person place a bag in an empty seat then move down the train car and stand next to the exit doors of

the train. Worried that the bag may contain dangerous materials, the officer asks in a loud voice whether anyone claims the bag. Getting no response, the officer announces that unless anyone claims the bag, he will examine it for safety reasons. The owner of the bag, which in fact contains explosives, stays silent. The officer examines the bag, realizes what it contains, stops the train, orders the passengers off, and arrests the owner. Under the reasoning of the Eleventh Circuit here and the Ninth Circuit's holding in *Stephens*, the officer's actions would likely be held to be a seizure, and the abandoned bomb-containing bag must be suppressed. *See also Illinois v. Besser*, 652 N.E.2d 454, 457-58 (Ill. App. 1995) (holding that police asking whether bus passenger owned a bag amounted to a seizure rendering abandoned bag illegally searched). It is difficult to square such a result with the notion that voluntariness necessarily incorporates the importance of consensual police-citizen questioning. *Cf. United States v. Garcia*, 909 F. Supp. 334, 338 (D. Md. 1995) (holding that police asking passengers to identify bags they owned was not a seizure despite police not informing the passengers of the right not to cooperate).

IV. THE COURT SHOULD AVOID IMPOSING ANY *PER SE* REQUIREMENT THAT LAW ENFORCEMENT OFFICERS GIVE A WARNING TO PUBLIC TRANSPORTATION PASSENGERS

There can be little doubt that the court below effectively announced a *per se* rule that officers approaching a passenger on board public transportation must inform the passenger of the right to refuse cooperation. The court explicitly followed the logic of its prior decision in *Washington*, *see* Pet. App. 5a, where the dissent recognized that "[s]hort of telling the passengers of the right to refuse consent, it is difficult to conceive of any actions these officers could have taken to make this search any more reasonable." 151 F.3d at 1358; *see also Broomfield*, 201 F.3d at 1275 (criticizing *Washington*). Tellingly, the *Washington* majority stated, "It

seems obvious to us that if police officers genuinely want to ensure that their encounters with bus passengers remain absolutely voluntary, they can simply say so." 151 F.3d at 1357.

A. Warnings Are Not Needed *Per Se* to Ensure That A Passenger's Cooperation Is Voluntary

There are, of course, situations where the Constitution requires that police inform citizens of their right not to answer questions. *See Dickerson v. United States*, 530 U.S. 428, 437-38 (2000). Thus, the Fifth Amendment requires that police give the now-familiar *Miranda* warning before questioning a suspect in custody because the coercion inherent in custodial interrogation renders a totality of the circumstances test insufficient to protect against coerced confessions. *Id.* at 442. Police questioning of citizens, even in the confines of a bus, is a horse of a different color.

Like confessions, the question of whether a police-citizen encounter is a seizure also turns on the voluntariness of the encounter. Assuming that Fourth Amendment protections are coextensive with those of the Fifth Amendment (and there is reason to doubt this),[11] an initial question is whether questioning in the confines of public transportation, a bus in particular, exerts the same coercive effect as custodial interrogation. In rejecting the suggestion that the Fourth Amendment requires officers to inform citizens of the right to refuse in the context of an officer's seeking consent for a search, the Court in *Schneckloth* reasoned that the practicalities and the environment of such interactions do not merit a *per se* rule requiring such a warning:

> it would be thoroughly impractical to impose on the normal consent search the detailed requirements of an

[11] *See Dickerson*, 530 U.S. at 441 ("unreasonable searches under the Fourth Amendment are different from unwarned interrogation").

> effective warning. Consent searches are part of the standard investigatory techniques of law enforcement agencies. They normally occur on the highway, or in a person's home or office, and under informal and unstructured conditions. . . . these situations are still immeasurably far removed from "custodial interrogation" where, in *Miranda v. Arizona*, *supra*, we found that the Constitution required certain now familiar warnings as a prerequisite to police interrogation.

412 U.S. at 231-32. Similarly, the Court rejected the suggestion that an officer must inform a lawfully seized citizen that he is "free to go" before the citizen's consent may be recognized as voluntary. *Ohio v. Robinnette*, 519 U.S. 33, 39-40 (1996).

The logic of these cases dictates that no *per se* rule would apply in the situation now before the Court. The *Washington* court distinguished *Schneckloth* and *Robinette* because those cases involved consensual searches after the defendant had been lawfully detained. 151 F.3d at 1357. But given that consensual police-citizen questioning rests on the same foundation – voluntariness – this distinction is irrelevant. Moreover, police questioning in the confines of a bus is a far cry from the carefully structured environment of custodial interrogation. *See Miranda v. Arizona*, 348 U.S. 436, 450-58 (1966) (describing custodial interrogation techniques). In fact, police have every incentive to avoid creating a coercive environment given the Court's totality of the circumstances test.

B. Any Per Se Warning Requirement Would Result in Substantial Costs to Society

The Nation's experience with *Miranda* shows that any *per se* warning requirement would exact societal costs in the form or higher crime rates and more unsolved crime. *See, e.g.*, Paul Cassell, Miranda's *Social Costs: An Empirical Reassessment*, 90 NW. U.L. REV. 387, 391 (1996) (stating that

Miranda resulted in "'lost cases' against roughly 28,000 serious violent offenders and 79,000 property offenders"); Paul Cassell, *All Benefits, No Costs: The Grand Illusion of* Miranda's *Defenders*, 90 NW. U.L. REV. 1084, 1085 (1996). While such costs might be acceptable to avoid the possibility of the courts being tainted by coerced (and therefore unreliable) confessions, it is difficult to square these potential costs to avoid possibly non-consensual questioning of bus passengers. *Cf. Schneckloth*, 412 U.S. at 242 ("The protections of the Fourth Amendment are of a wholly different order, and have nothing whatever to do with promoting the fair ascertainment of truth at a criminal trial").

That a *per se* rule requiring a *Miranda*-type warning would result in societal costs is buttressed by the unstructured nature of consensual police-citizen questioning. Although many of these cases arise in the quasi-structured scenario of a planned bus or train interdiction, consensual police-citizen questioning more often arises in far less predictable situations. A requirement of a *Miranda*-type warning would undoubtedly inhibit police investigations and result in an increase in unsolved crime.

CONCLUSION

For the foregoing reasons *amici curiae* Washington Legal Foundation and the Allied Educational Foundation respectfully request that the judgment of the court of appeals be reversed.

Respectfully submitted,

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No. 01-631

In The
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

vs.

CHRISTOPHER DRAYTON AND
CLIFTON BROWN, JR.
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS,
ELEVENTH CIRCUIT

BRIEF AMICI CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, AND THE NATIONAL SHERIFFS' ASSOCIATION IN SUPPORT OF PETITIONER.

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Brief

AELE *Amicus Curiae* Brief in *Florida v. Bostick*,
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This brief is filed pursuant to Rule 37 of the United States Supreme Court. Consent to file has been granted by respective Counsel for the Petitioner and Respondents. The letters of consent have been filed with the Clerk of this Court, as required by the Rules.[1]

INTEREST OF *AMICI CURIAE*

Americans for Effective Law Enforcement, Inc. (AELE), as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties, and property, within the framework of the various state and federal constitutions.

AELE has previously appeared as *amicus curiae* over 100 times in the Supreme Court of the United States and over 35 times in other courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio, and Missouri.

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[1] As required by Rule 37.6 of the United States Supreme Court, the following disclosure is made: This brief was authored for the *amici* by James P. Manak, Esq., counsel of record, Wayne W. Schmidt, Esq., Executive Director of Americans for Effective Law Enforcement, Inc., and Carl Milazzo, Assistant Executive Director of Americans for Effective Law Enforcement, Inc. No other persons authored this brief. Americans for Effective Law Enforcement, Inc., made the complete monetary contribution to the preparation and submission of this brief, without financial support from any source, directly or indirectly.

The International Association of Chiefs of Police, Inc. (IACP), is the largest organization of police executives and line officers in the world. Founded in 1893, the IACP, with more than 17,000 members in 112 countries, is the world's oldest and largest association of police executives. IACP's mission, throughout the history of the association, has been to identify, address, and provide solutions to urgent law enforcement issues.

The National Sheriffs' Association (NSA), is the largest organization of sheriffs and jail administrators in America, consisting of over 40,000 members. It conducts programs of training, publications, and related educational efforts to raise the standard of professionalism among the nation's sheriffs and jail administrators. While it is interested in the effective administration of justice in America, it strives to achieve this while respecting the rights guaranteed to all under the Constitution.

Amici are national associations representing the interests of law enforcement agencies at the state and local levels. Our members include: (1) law enforcement officers and law enforcement administrators who are charged with the responsibility of overseeing investigative stops and consensual interactions between law enforcement officers and members of the public; and (2) police legal advisors who, in their criminal jurisdiction capacity, are called upon to advise law enforcement officers and administrators in connection with such matters, including the formulation and implementation of training and policy on the subject.

Because of the relationship with our members and the composition of our membership and directors, including active law enforcement administrators and

counsel, we possess direct knowledge of the impact of the ruling of the court below, and we wish to impart that knowledge to this Court.

STATEMENT OF THE CASE

The court below, *United States v. Drayton*, 231 F.3d 787 (11th Cir. 2000), reversed the narcotics convictions of the respondents, passengers on an interstate bus, who agreed to a pat-down search by police officers who boarded the bus when it stopped at a bus station in Florida.

Three officers boarded the bus, with two walking to the back while the third knelt in the driver's seat facing the passengers. The two officers walked up the aisle from the rear, talking to passengers about their destinations and saying that they were conducting a "bus interdiction" in an effort to find drugs and weapons. None of the officers blocked the aisle of the bus, issued verbal orders, or said or did anything to prevent passengers from leaving the bus. The respondents, who were seated together, allowed the officers to search their overhead luggage, which contained nothing illegal.

The officers, who noticed that the men were wearing heavy, baggy clothing on a hot day, then asked permission to conduct a pat-down search. They received permission, and detected objects on the men's legs that resembled packages of drugs. Both men were arrested and taken off the bus. A further search revealed packages of cocaine taped inside multiple pairs of respondents' underpants.

In reversing their convictions, the court below held

that "these defendants' consent was not sufficiently free of coercion to serve as a valid basis for a search." The court said respondents were not informed that they were free to leave and that because of the presence of the third officer at the front of the bus, a "reasonable person" would not have felt free to leave.

Certiorari was taken by this Court on the question: Has officer who informs passenger on bus that officer is conducting drug and illegal weapons interdiction and asks passenger for consent to search, while another officer stays at front of bus without blocking exit, effected "seizure" of that passenger within meaning of Fourth Amendment and *Florida v. Bostick*, 501 U.S. 429 (1991)?

SUMMARY OF ARGUMENT

Amici take the position that under the Court's precedent in *Florida v. Bostick*, 501 U.S. 429 (1991) and *I.N.S. v. Delgado*, 466 U.S. 210 (1984), respondents were not seized within the meaning of the Fourth Amendment when they voluntarily consented to a search. In addition to failing to apply these precedents, the court below has, in effect, constructed a Fourth Amendment warning requirement before a person may consent to a search of his property or person. This rule contradicts established precedent in *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973) and *Ohio v. Robinette*, 519 U.S. 33 (1996).

Amici note that law enforcement administrators have adopted training and policy that conforms to this Court's rulings in these cases. The majority of the federal and state courts have conformed to this Court's interpretation of the Fourth Amendment in *Bostick*,

Delgado, *Schneckloth*, and *Robinette*. The court below, however, has chosen to deviate from these rulings, setting up a situation where administrators and legal advisors now have conflicting rules to deal with drug and weapons interdiction in public transportation settings.

It is important and significant that when this Court defines legal parameters, officers are trained to follow the law and policies are drafted to conform with the law. While "bright line" rules, *New York v. Belton*, 453 U.S. 454 (1981), are not always possible, training and policies strive to mirror the rulings of this Court. Yet when an appellate court simply refuses to follow the rules, officers then run the risk of false arrest lawsuits and are discouraged from following the actual law because they have now been told by a lower court that what they are doing is wrong.

As police administrators and related officials, *amici* point to the need for a clear statement from the Court on the propriety of such actions by local and state law enforcement officers so that uniform and consistent policies and rules can be adopted and implemented by law enforcement agencies. This need is underscored by the existence of conflict created by the decision of the court below.

ARGUMENT

A LAW ENFORCEMENT OFFICER WHO INFORMS A PASSENGER ON A BUS THAT THE OFFICER IS CONDUCTING DRUG AND ILLEGAL WEAPONS INTERDICTION AND ASKS THE PASSENGER FOR CONSENT TO SEARCH, WHILE ANOTHER OFFICER STAYS AT THE FRONT OF THE BUS WITHOUT BLOCKING THE EXIT, HAS NOT EFFECTED A "SEIZURE" OF THAT PASSENGER WITHIN THE MEANING OF THE FOURTH AMENDMENT AND NEED NOT ADVISE THE PASSENGER OF HIS RIGHT TO REFUSE CONSENT.

The Fourth Amendment protects against unreasonable "seizures." This Court has often addressed whether, and under what circumstances, a police-citizen encounter rises to the level of a Fourth Amendment "seizure." In *Terry v. Ohio*, 392 U.S. 1 (1968), the Court held that a "seizure" occurs only when an officer, by means of physical force or show of authority, has in some way restrained the liberty of a person. In *California v. Hodari*, 499 U.S. 621 (1991), this Court ruled that if a reasonable person would feel free to disregard the police and go about his business, the encounter is consensual and not governed by the Fourth Amendment. Consensual encounters have been approved by this Court in *Florida v. Rodriguez*, 469 U.S. 1 (1984) (request to examine identification), and *United States v. Mendenhall*, 446 U.S. 544 (1980) (request for consent to search luggage).

In *Florida v. Bostick*, 501 U.S. 429 (1991)[1] the Court considered the application of these principles in the context of bus interdiction efforts. Law enforcement authorities often station police officers at "airports, train stations, and bus depots," and "[l]aw enforcement officers stationed at such locations routinely approach individuals, either randomly or because they suspect in some vague way that the individuals may be engaged in criminal activity, and ask them . . . questions"; sometimes, they also ask for consent to perform searches. *Bostick*, 501 U.S. at 431. *Bostick* involved the boarding of buses at scheduled stops and asking passengers for permission to search their luggage for narcotics.

Amici believe that an officer's introduction of himself and announcement of his law enforcement mission is not by itself a sufficient basis for finding a Fourth Amendment seizure, even when that occurs on a bus.

Bostick makes clear that a seizure occurs only when an officer invokes his legal authority by issuing commands or otherwise communicating to the person that he is not free to go or to decline cooperation and thereby restrains the person's liberty. While the police may not "demand of passengers their 'voluntary' cooperation" through "an 'intimidating show of authority,'" such as pointing their weapons at people or otherwise engaging in conduct that might overbear the

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[1] AELE filed an *amicus curiae* brief in *Bostick* expressing concerns about possible police abuses in bus interdiction programs. Those abuses have not materialized and with the exception of the 11th Circuit Court of Appeals, the law has become settled and clear since *Bostick* was decided.

passengers' will, 501 U.S. at 438, merely identifying oneself and showing a badge, so that the person understands that he is communicating with the police rather than dealing with possibly illegal conduct by strangers, does not constitute coercion under the Fourth Amendment. See *Florida v Rodriguez*, 469 U.S. 1 (1984); *I.N.S. v. Delgado*, 466 U.S. 210 (1984).

Another factor relied on by the court below—the presence of a single officer in the bus driver's seat, near the exit, looking backward to ensure officer safety while two officers talked to the bus passengers—also does not support a finding of a seizure. In *Delgado* there were multiple officers stationed near the exits of a factory while federal agents walked through the factory checking the immigration status of employees, yet this Court expressly rejected the suggestion that their presence converted the otherwise consensual interactions within the factory into Fourth Amendment seizures.

Perhaps the most significant departure of the court below from established precedent is its construction, in effect, of a rule that law enforcement officers in these settings must warn persons of their right to refuse a consent to search. This concept was rejected by this Court in *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973) ("[W]hile the subject's knowledge of a right to refuse [to consent] is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent." 412 U.S. at 231). More recently it was rejected in *Ohio v. Robinette*, 519 U.S. 33 (1996), where this Court reversed the Ohio Supreme Court's holding that the Fourth Amendment required a police officer to advise a person, who had been lawfully detained for a traffic stop, that he was "free to go" before his consent to the officer's request

to search his car could be recognized as voluntary. The Court said, "we have consistently eschewed bright-line rules" in the Fourth Amendment context and explained that *Schneckloth* had "previously rejected a per se rule very similar" to the one adopted by the state supreme court in that case. 519 U.S. at 39.

While *amici* agree that bright line rules are not always possible or desirable, law enforcement officers need guidance through training and policy consistent with *Bostick, Schneckloth, Robinette,* and other precedents of this Court. This case involves no more than the actions of two police officers talking to bus passengers in a non-intimidating, non-threatening manner, while a third officer positioned himself at the front of the bus in a seat to check that the officers in the rear were safe and not blocking the aisle or otherwise preventing anyone from leaving the bus. There were no commands given and no general announcement of a coercive nature. Under *Bostick* and *Delgado* it is clear no Fourth Amendment seizure took place. Under *Schneckloth* and *Robinette* it is clear that no Fourth Amendment warnings were required. "Clear," except in the 11th Circuit where different rules now apply.

Amici believe that consensual interactions between police officers and people on public transportation are an essential part of the law enforcement effort to combat the flow of illegal narcotics and weapons. Without them, law enforcement efforts will be greatly diminished.

If the police are required to warn persons on public transportation of their right to refuse consent, it will be necessary to create policies and forms to implement such procedures and create an evidentiary basis for establishing the advisement and waiver. In a bus, train,

or airport scenario, it would require officers to follow procedures that would greatly increase the administrative and operational burden of screening and interacting with passengers. It would discourage law enforcement officers from engaging in consensual contacts with the public and could result in the non-interdiction of drugs and weapons. It would also greatly inconvenience those who use public transportation and lead to inordinate delays at public transportation facilities and conveyances.[1]

State and local law enforcement officers need a clear statement from this Court reiterating the application of *Bostick* and other precedents to interactions between law enforcement officers and the public on public transportation in order to facilitate training and policy on the subject.

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[1] Of course, states are free to establish such rules as the result of interpreting state constitutional provisions. *Oregon v. Hass*, 420 U.S. 714 (1975); *Michigan v. Long*, 463 U.S. 1032 (1983); *State v. Johnson*, 68 N.J. 349, 346 A.2d 66 (1975) (under state constitution it must be shown that consenting party had knowledge of right to refuse); *State v. Hardaway*, 2001 MT 252, 36 P.3d 900 (Mont. 2001) (state constitution granting citizens a specific right to privacy assures citizens a greater right to privacy and broader protections than does federal constitution in the area of searches incident to arrest). But this Court has made it clear that the Fourth Amendment does not require warnings for a consent to search. *Schneckloth v. Bustamonte, supra; Ohio v. Robinette, supra.*

CONCLUSION

Amici urge this Court to uphold the constitutionality of the police conduct involved in this case and similar actions of law enforcement officers on public transportation, on the basis of the Court's precedents and sound judicial policy.

Respectfully submitted,

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In The

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

CHRISTOPHER DRAYTON and
CLIFTON BROWN, JR.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENTS

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BRIEF OF AMICUS NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

This brief amicus curiae is submitted in support of Respondents Christopher Drayton and Clifton Brown, Jr., By letters filed with the Clerk of the Court, Petitioner and Respondents have consented to the filing of this brief. [1]

INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with a membership of more than 10,000 attorneys and 28,000 affiliate members, including representatives from all fifty states. The NACDL was founded in 1958 to promote study and research in the field of criminal law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage the integrity, independence and expertise of defense lawyers in criminal cases. NACDL seeks to defend individual liberties guaranteed by the Bill of Rights and has a keen interest in ensuring that legal proceedings are handled in a proper and fair manner.

In NACDL's view, there are three important overlapping issues presented in this case: (1) should the type of police intrusion involved in this case be sanctioned by this Court: (2) under what circumstances can law enforcement officers' request for consent in a tight confines of a interstate bus be permitted; (3) how

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[1] As required by Rule 37.6 of this Court, *amicus curiae* submits the following: no party or party's counsel authored this brief in whole or in part; no person or entity other than *amicus curiae*, its members, or its counsel, have made a monetary contribution to the preparation or submission of this brief.

should the question of consent be determined in inherently coercive circumstances?

NACDL, consistent with its mission, files this brief amicus curiae in support of Respondents' claim that the consent in this case was not freely and voluntarily given, as the 11th Circuit correctly determined. Justice Marshall wrote in dissent in this Court decision in *Florida v. Bostick*, 501 U.S. 429, 440 (1990), "the law-enforcement technique with which we are confronted in this case -- the suspicionless police sweep of buses in intrastate or interstate travel -- bears all of the indicia of coercion and unjustified intrusion associated with the general warrant." The type of intrusion involved here in the inherently coercive circumstances of a small bus cannot be allowed. Because the NACDL believes that the Fourth Amendment's strictures against warrantless searches and seizures without probable cause were violated in this case, it presents its view in this amicus brief.

STATEMENT

Amicus adopts Respondents' statement of the case.

SUMMARY OF ARGUMENT

This Court established a flexible rule in *Florida v. Bostick*, 501 U.S. 429 (1991) under which law enforcement requests for consent to search passengers on a bus must be weighed carefully. The key issue is whether weighing all the circumstances, the police conduct would "have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about

his business." The Court below considered a number of factors in this case, including the physical presence and positioning of the officers, the intimidating manner in which the requests for consent were made, the failure to assure passengers that they had the right to leave or refuse consent, and the intrusion into the bodies of the defendants (as opposed to a search of their luggage).

The Court's decision that the consent was not freely and voluntarily given was proper and should be respected.

ARGUMENT

THE CONSENT TO THE SEARCH WAS NOT FREELY AND VOLUNTARILY GRANTED

The circumstances under which the search in this case was accomplished was described by the Court below. Three officers went on board an interstate bus between Florida and Detroit. After the bus stopped at Ft. Lauderdale, three officers went on board. Judge Barnes described the events that followed:

> Once on board the bus the officers did not make any general announcements to the passengers nor did they hold up their badges for all of the passengers to see. Officers Lang and Blackburn made their way to the back of the bus, while Officer Hoover knelt in the bus driver's seat, facing toward the rear of the bus in order to observe the passengers and ensure the safety of the other officers. In that position, Hoover could see the passengers and they could see him.

231 F.3d at 789.

Two of the officers worked their way down the bus, questioning each passenger.

> Officers Lang and Blackburn went to the back of the bus and started working their way forward, asking passengers where they were traveling from, and attempting to match passengers to the luggage in the overhead rack. The officers did not block the aisle, but instead stood next to or behind the passengers with whom they were talking. According to Lang's testimony, passengers who declined to have their luggage searched or who wished to exit the bus at any time would have been permitted to do so without argument. *Id.*

The officers then came to Respondents' seat.

> Officer Lang had noticed that both defendants were wearing heavy jackets and baggy pants despite the fact that it was a warm day, and he thought that they were overly cooperative during the search. So Lang requested and received permission from Brown to conduct a pat-down search of his person for weapons. Brown leaned up in his seat, pulled a cell phone out of his pocket, and opened up his jacket. Lang then reached across Drayton and patted down Brown's jacket and pockets, including his waist area, sides, and upper thighs. In both thigh areas, Lang detected hard objects which were inconsistent with human anatomy but similar to drug packages he had found on other occasions. Lang arrested and handcuffed Brown, and Officer Hoover escorted Brown off the bus. *Id.*

Officer Lang then turned to Drayton.

> Lang next turned to Drayton and asked, "Mind if I check you?" Drayton responded by lifting his hands approximately eight inches off of his legs. Lang conducted a similar pat-down of Drayton's thighs. When Lang detected hard objects on Drayton's thighs similar to those he had felt on Brown, Drayton was arrested and escorted off the bus. *Id.*

Respondents were searched once they got off the bus.

> Once the defendants were off the bus, Lang unbuttoned their trousers and found plastic bundles of powder cocaine duct-taped between several pairs of boxer shorts. Drayton had two bundles containing 295 grams of cocaine, and Brown had three bundles containing 483 grams of cocaine. 231 F.3d at 789-790.

Under these circumstances, the 11th Circuit found that there was a "show of authority" by the officers on board that rendered any consent to search coercive. It did not establish or follow any *per se* rule that consents on busses are automatically coercive. The Court explained:

> Although there was no general show of authority at the front of the bus in this case, there was a specific show of authority passenger-by-passenger. Officer Lang approached the defendants with his badge held up in his hand, leaned over with his face 12-18 inches from Drayton's, and told the defendants that he was conducting a bus interdiction, looking for drugs and illegal weapons. We do not believe that a passenger-specific show of authority is any less coercive than a general bus-wide one. 231 F.3d at 790.

The Court below focused on the issue of what would have happened to passengers who left the bus after the police indicated that they would permit people to leave "without argument." The Court accepted the proposition that *in other situations*, no adverse action was taken against those who left the bus. "Lang testified that during the past year five to seven people had declined to have their luggage searched, and that passengers had often exited the bus while the officers were on it." 231 F.3d at 790-91. But given the large number of times Officer Lang had stopped busses and requested consents to search, that did not answer the problem of whether the request for consent *in this case* was coercive or not. "Officer Lang did not testify that the statements the officers made and the methods they used in the searches where passengers declined to give consent or exited the bus were the same as in this case." 231 F.3d at 791.

This Court noted in *Florida v. Bostick*, 501 U.S. 429, 436 (1991) that there is no *per se* rule relating to bus searches, as the Florida Supreme Court had seemed to establish in the decision appealed from in that case. The key legal issue is "whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter." Thus in a bus or at an airline terminal or in a factory, "the crucial test is whether, taking into account all of the circumstances surrounding the encounter, the police conduct would 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business,'" *id.* at 437, citing *Michigan v. Chesternut*, 486 U.S. 567, 569 (1988)

There are a series of factors which must be considered to determine whether a "show of authority" rendered any later consent involuntary. The Second

Circuit explained in *United States v. Garcia*, 56 F.3d 418, 422 (2d Cir. 1995): "To ascertain whether consent is valid, courts examine the totality of the circumstances to determine whether the consent was a product of that individual's free and unconstrained choice, rather than a mere acquiescence is a show of authority." (internal quotation marks and citations omitted). Further, as this Court held in *Schneckcloth v. Bustamante*, 412 U.S. 218, 222 (1973), the official claiming that a search was consensual has the burden of demonstrating that the consent was given freely and voluntary. Among the factors considered:

> would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.

United States v. Mendenhall, 446 U.S. 544, 554 (1980).

Other courts have focused on "the place" where the request for consent was made, "the officer's tone of voice," whether the officer displayed a weapon or handcuffs, or "touched the individual without permission," threatened "or physically intimidated him," *United States v. Tavolacci*, 895 F.2d 1423, 1424-26 (D.C. Cir. 1990).

Lower courts (see discussion below) and academic literature note the special circumstances that arise when passengers are questioned in a bus: the tight confines, the lack of any real ability to simply walk away (as on the street or in an airport), the psychological pressure brought on the suspect because of the immediate presence of other passengers, the lack of any real warnings on the

alternatives available if consent is declined. One recent law review article after examining various "obedience studies" that indicate how verbal pressure can induce consent, has described the problem as follows:

> Relative to the distinction drawn in *Schneckloth* between the inherently coercive environment surrounding custodial interrogations and noncustodial search requests determined to be less susceptible to coercion, one can infer from the obedience studies that the bus setting can be leveraged by police to induce "consent." The confines of the bus coupled with questioning from an authority figure advance along the continuum toward the custodial interrogation pole and thus should require Miranda-like warnings to be delivered upon boarding and as part of the consent to search request.

Note, "The Long-Distance Remand: Florida v. Bostick and the Re-Awakened Bus Search Battleground in the War on Drugs," 45 *Wm. & Mary Law Rev.* 365, 411-412 (2001).

The Article also described the importance of some warning in the special context of a bus search:

> The Supreme Court in *Bostick* found it "particularly worth noting ... [that] the police specifically advised Bostick that he had the right to refuse consent." No such warning was given in either *Guapi* [*United States v. Guapi*, 144 F.3d 1393 (11th Cir. 1998] or *Washington* [*United States v. Washington*, 151 F.3d 1354 (11th Cir. 1998)]. The *Washington* panel, though it explicitly followed the Supreme Court's dictate against per se rules in the Fourth Amendment context, was especially clear that it viewed the combination of an on-bus encounter with an absence of warnings as a presumptive indication of a Fourth Amendment violation.

Id. at 412.

Under almost exactly the same circumstances as those described below, the Ninth Circuit found when three officers entered a bus and closely questioned passengers about possible contraband, they had created a coercive atmosphere in which the passengers were made to feel that they "not at liberty to ignore the police presence and go about his business." Therefore, the abandonment of a package by one of the passengers was not voluntary, just as the consent to search on this case was not voluntary. The Court explained:

> Police officers may not approach passengers on a bus, and request their consent to be questioned and searched if the officers "convey a message that compliance with their requests is required." *Florida v. Bostick*, 501 U.S. 429, 437 (1991). The test for whether a bus search is constitutional is not whether a reasonable person would feel "free to leave." *Id.* at 436. The test is whether, considering all of the circumstances, "a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter." *Id.* This is because "when a person is seated on a bus and has no desire to leave, the degree to which a reasonable person would feel that he or she could leave is not an accurate measure of the coercive effect of the encounter." *Id.*

United States v. Stephens, 206 F.3d 914, 917 (9th Cir.

2000).

When officers board a bus under these circumstances and tell (i.e. warn) the passengers that they are free to leave, they give passengers a Hobson's choice, as the Ninth Circuit found.

> Here, the STING officers advised passengers that they were "free to leave" the bus. They did not tell passengers that they were free to remain on the bus and terminate the encounter by declining to answer their questions. The instructions given over the Greyhound public address system conveyed to passengers that they had two choices: stay on the bus and consent to the search, or get off the bus. This was a Hobson's choice because by getting off the bus, a passenger ran the risk of giving the STING officers reasonable suspicion to stop him. 206 F.3d at 917.

Similarly the Eleventh Circuit suppressed evidence after a consent search in a prior case, *United States v. Washington*, 151 F.3d 1354 (11th Cir. 1998). The Court found that the consent given to the search was coercive when two law enforcement officers came on a bus and declared that they would be asking each passenger to present photo identification and to identify his or her luggage. Consent to a body search was given by the defendant when he was approached and closely questioned by one of the officers.

> There is no doubt in this case that the encounter began with a "show of authority," because Agent Perkins held his badge above his head and identified himself as a federal agent. He announced what he wanted the passengers to do, and what he was going to do. Absent some positive indication that they

> were free not to cooperate, it is doubtful a passenger would think he or she had the choice to ignore the police presence. Most citizens, we hope, believe that it is their duty to cooperate with the police. 151 F.3d at 1357.

The Court below in this case did not establish a *per se* rule, condemning all bus searches and requests for consent. It took into account a number of factors: (1) the close confines of the bus; (2) the presence of three officers; (3) the placement of one officer at the front of the bus, suggesting that the passengers were confined; (4) the intimidating approach made by the officer to Drayton ("lean[ing] over with his face 12-18 inches from Drayton's, and [telling] the defendants that he was conducting a bus interdiction, looking for drugs and illegal weapons"); (5) the failure to make a general announcement in this case (as opposed to other instances in which the announcement was apparently made) that a inquiry was being conducted and but that persons were free to leave; (6) the intrusive search into the body of a passenger (as opposed to a search of luggage).

Under these circumstances, the decision of the Court correctly applied this Court's rule in *Bostick*. Its decision should be affirmed.

CONCLUSION

For the reasons stated above, the decision below should be affirmed.

Dated: New York, N.Y.
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